

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JKF)
. .
W.R. GRACE & CO., .
et al., . USX Tower - 54th Floor
. 600 Grant Street
. Pittsburgh, PA 15219
Debtors. .
. September 8, 2009
. 9:05 a.m.

TRANSCRIPT OF PLAN CONFIRMATION HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE COURT: Please be seated. This is the matter of
2 W.R. Grace, Bankruptcy Number 01-1139. Today is the beginning
3 of the Phase II confirmation hearing. I have a list of
4 participants by phone. Scott Baena, Janet Baer, Ari Berman,
5 David Bernick, David Blabey, Thomas Brandi, Peg Brickley,
6 Elizabeth Cabraser, Stefano Calogero, Christopher Candon, James
7 Carignan, Steven Church, Richard Cobb, Tiffany Cobb, Jacob
8 Cohn, Ann Cordo, Andrew Craig, Joshua Cutler, Leslie Davis,
9 Michael Davis, Elizabeth DeCristofaro, Elizabeth Devine, Martin
10 Dies, Melanie Dritz, Terence Edwards, Lisa Esayian, Marion
11 Fairey, Brett Fallon, Debra Felder, Jordan Fisher, Theodore
12 Freedman, Brian Gootzelt -- I'm sorry, Gootzeit I think it is
13 -- James Green, Robert Guttman, Daniel Hogan, Robert
14 Horkovich, Brian Kasprzak, David Klauder, John Kozyak, Matthew
15 Kramer, Michael Lastowski, John Matthey, Garvan McDaniel, Tara
16 Mondelli, Kerri Mumford, Marti Murray, Anna Newsom, James
17 O'Neill, David Parsons, Carl Pernicone, Margaret Phillips, John
18 Phillips, Curtis Plaza, Mark Plevin, Andrew Rosenberg, Ian
19 Rosenberg, David Rosendorf, Alan Runyan, Jay Sakalo, Darrell
20 Scott, Mark Shelnitz, Michael Shiner, Marnie Simon, Daniel
21 Speights, Shayne Spencer, Theodore Tacconelli, Edward
22 Westbrook, Tacie Yoon and Rebecca Zubaty. I'll take entries in
23 court please. Good morning.

24 MR. BERNICK: Good morning, Your Honor. David
25 Bernick for Grace.

1 MR. FINCH: Good morning, Your Honor. Nathan Finch
2 for the Official Committee for Asbestos Personal Injury
3 Claimants.

4 MR. LOCKWOOD: Good morning, Your Honor, Peter
5 Lockwood also for the Asbestos Committee.

6 THE COURT: Mr. Lockwood, I don't think whatever
7 microphone you were using was on if you were using one.

8 MR. LOCKWOOD: Peter Lockwood for the Asbestos
9 Claimants' Committee, Your Honor.

10 THE COURT: Thank you.

11 MR. GUY: Jonathan Guy for the Asbestos PI Future
12 Claimants' Representative, I'm here with Roger Frankel.

13 THE COURT: Thank you. Good morning.

14 MR. LEWIS: Good morning, Your Honor. Tom Lewis for
15 Libby claimants.

16 MR. KOVACICH: Mark Kovacich for the Libby claimants.

17 MR. HEBERLING: Jon Heberling for the Libby
18 claimants.

19 THE COURT: Can't hear you sir. I can't hear you.
20 I'm sorry, your microphone's not on.

21 MR. LACY: John Lacy for the Libby claimants.

22 MR. COHN: Good morning. Dan Cohn for the Libby
23 claimants.

24 THE COURT: Yours isn't on either, Mr. Cohn. No,
25 press the button. That's on now.

1 MR. COHN: Okay. Terrific, thank you.

2 THE COURT: Thank you.

3 MR. HURFORD: Good morning, Your Honor. Mark
4 Hurford, Campbell Levine for the ACC.

5 MR. O'NEILL: Good morning, Your Honor. James
6 O'Neill for Grace.

7 MR. KRAMER: Good morning, Your Honor. Matt Kramer
8 for the Property Damage Committee.

9 MR. MANGAN: Good morning, Your Honor. Kevin Mangan
10 for the State of Montana.

11 MR. CASSADA: Good morning, Your Honor. I'm Garland
12 Cassada. I'm here with my partner, Rich Worf. We're here for
13 Garlock Sealing Technologies.

14 THE COURT: I'm sorry, sir, would you spell your last
15 name please?

16 MR. CASSADA: Yes, it's C-a-s-s-a-d-a.

17 THE COURT: And who are you with, sir?

18 MR. CASSADA: I'm with the law firm Robinson,
19 Bradshaw and Hinson, I represent Garlock --

20 THE COURT: Yes, who was your co-counsel? I'm sorry.

21 MR. CASSADA: My co-counsel, Richard Worf.

22 THE COURT: Thank you.

23 MR. CASSADA: And also our local counsel, Brett
24 Fallon, is on the telephone.

25 THE COURT: All right. Thank you.

1 MR. CASSADA: Thank you.

2 MR. RICH: Good morning, Your Honor. Alan Rich for
3 the Property Damage FCR.

4 THE COURT: Good morning.

5 MR. COHN: Good morning, Your Honor. Jacob Cohn for
6 Federal Insurance Company.

7 MR. PASQUALE: Good morning, Your Honor. Ken
8 Pasquale and Arlene Krieger from Strook for the Unsecured
9 Creditors' Committee.

10 MR. SHINER: Good morning, Your Honor. Michael
11 Shiner for AXA Belgium, its successor to Royal --

12 THE COURT: Pardon me. Folks, pardon me. Excuse me.
13 Counsel, if you want to talk, use the attorney conference rooms
14 please. I'm not going to be able to deal all day long with
15 people talking in the background. I'm sorry. Mr. Shiner,
16 would you start again?

17 MR. SHINER: Good morning, Your Honor. Michael
18 Shiner, counsel for AXA Belgium, a successor to Royal Beige and
19 certain London Market companies.

20 THE COURT: Thank you.

21 MR. PARSONS: Good morning, Your Honor. David
22 Parsons from the Reaud, Morgan and Quinn firm on behalf of the
23 Edwards' judgment claimants.

24 THE COURT: Good morning.

25 MS. CASEY: Good morning, Your Honor. Linda Casey on

1 behalf of BNSF Railway Company.

2 MS. COBB: Good morning, Your Honor. Tiffany Cobb on
3 behalf of the Scott's Company, LLC.

4 MR. TURETSKY: Good morning, Your Honor. David
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10 MS. ALCABES: Good morning, Your Honor. Elisa
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12 THE COURT: One second please. Thank you.

13 MR. BROWN: Good morning, Your Honor. Michael Brown
14 and Jeff Burger and we're here for One Beacon American
15 Insurance Company, Seaton Insurance Company, GEICO and Republic
16 Insurance Company.

17 MR. CRAIG: Good morning, Your Honor. Andrew Craig
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22 MR. GLOSBAND: Good morning, Your Honor. Dan
23 Glosband also for Continental Casualty et al.

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7 MR. DOLLSON: Good morning, Your Honor. Richard F.
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9 MR. LONGOSZ: Good morning, Your Honor. Edward
10 Longosz, also on behalf of Maryland Casualty and Zurich.

11 MS. BAER: Good morning, Your Honor. Janet Baer on
12 behalf of W.R. Grace. Your Honor, also with me is Ted Freedman
13 and Barbara Harding. And, Your Honor, Ms. Harding is going to
14 be needing to step out in a little while, so just wanted to let
15 you know there will be a little activity there.

16 THE COURT: All right.

17 MS. BAER: Your Honor, before we start the
18 confirmation hearing, there are a number of settlements on the
19 agenda where there have been no objections and we'd ask Your
20 Honor if we could get those entered.

21 THE COURT: I haven't seen them yet.

22 MS. BAER: I have them all, Your Honor, in front of
23 me.

24 THE COURT: I have not read the motions yet, so no,
25 I'm not prepared at all to do the settlements. I'll try to get

1 to them after court. They were in binders that were locked in
2 boxes and I haven't seen them, so no, I cannot do the
3 settlements yet.

4 MS. BAER: We understand, Your Honor. There are four
5 settlements, Your Honor, there are no objections on any of
6 them. They are Scotts, London Market Companies, St. Paul
7 Companies and Allstate Insurance, Your Honor.

8 THE COURT: Do you know what agenda numbers they are
9 in the binders?

10 MS. BAER: Yes, Your Honor. They're Agenda Numbers
11 2, 3, 4 and 5. Agenda Item Number one takes up almost all the
12 binders, which is the confirmation.

13 THE COURT: All right. I will get to them as soon as
14 I can, but I can't address them now.

15 MS. BAER: Thank you, Your Honor. There are also,
16 Your Honor, three orders that were filed also with certificates
17 of counsel related to the August 24th omnibus hearing. Those
18 three orders related to certain witnesses and things like that
19 that affect the confirmation. Again, submitted with CLC's --

20 THE COURT: Those should have been ordered this
21 morning.

22 MS. BAER: Okay. Then we will proceed, Your Honor,
23 at this point with the confirmation matters.

24 THE COURT: All right.

25 MR. BERNICK: In half a heartbeat we're going to

1 start the evidence, Your Honor, here, with Mr. Inselbuch, but I
2 did want, if you could show please to the Court PP-500 to --
3 got it on the screen?

4 THE COURT: No, Mr. Bernick, I'm sorry. I just lost
5 -- I don't know what I just lost. Give me a second please to
6 get back to where I was here.

7 (Pause)

8 THE COURT: I'm sorry, Mr. Bernick. What is it that
9 you're showing me?

10 MR. BERNICK: Yes, I just want to remind the Court,
11 just kind of a little checklist, because there are a number of
12 motions that have been filed with regard to the Libby related
13 evidence and we've just got a chart here and we'll furnish a
14 copy to the Court. This is PP-500. And we'll also furnish
15 copies to opposing counsel. It simply lists the various
16 motions that relate to the Libby evidence that are still
17 pending. And we've also broken it down by the witness who's
18 affected by the motion. So that's all this is. As to which
19 witnesses do we have Daubert motions, which witnesses are
20 affected by the 1800 claimants' issue and the like. It's just
21 for the Court's information as to kind of a checklist and
22 that's all that it is. And I'm assuming that now that we have
23 made those motions in limine, that as the evidence is
24 introduced by the Libby claimants that implicate these various
25 matters, that our record is preserved as having made objections

1 on this basis or on the basis that are set forth in those
2 motions, and that we don't have to stand up and reiterate those
3 objections on an ongoing basis during the course of the trial.
4 If that's satisfactory with the Court, obviously we would like
5 to have the matters also ruled on. Some of them actually do
6 relate, not simply to issues of relevance, there are a couple
7 that relate to relevance, but most of these relate to
8 procedural matters. That is, the failure to disclose the 1800
9 patient files, there's no expert report regarding treating
10 physicians. Those are the objections and if Your Honor would
11 prefer, the first time they come up, we're happy to raise them
12 also orally. But we want to make sure this is, it's kind of a
13 somewhat complicated rubric, we want to make sure that the
14 Court is alerted to the fact that these objections are out
15 there and that they will be coming up in connection with the
16 testimony that's about to begin.

17 THE COURT: I think it would be advisable to raise
18 them the first time and then tell me what it is that you want.
19 Because I thought I'd ruled on some of these issues that came
20 up prepetition. I just this morning got two motions that I
21 haven't seen before that were apparently filed yesterday. One
22 by Fireman's -- or one by the debtor on behalf of the motion
23 filed by Fireman's Fund. I've never seen the motion filed by
24 Fireman's Fund, it was never transmitted to me in accord with
25 the case management order, so I have no clue what that's all

1 about. And the other concerning a confidentiality issue with
2 respect to the --

3 MR. BERNICK: Yes. I appreciate that, Your Honor.
4 The confidentiality issue, we've had further conversations.
5 There's a whole series of conversations, we've had further
6 conversations, and Your Honor does not need to be concerned
7 with that right now because those conversations may result in
8 an agreement. But essentially that relates to the presentation
9 of evidence relating to individual settlements in medical
10 records where there are confidentiality concerns. And the
11 question is whether we had to clear the courtroom, whether
12 we're going to go through and redact, you know, hundreds of
13 records. So that issue is out there. I think we'll -- I hope
14 we'll be able to resolve it.

15 With respect to Fireman's Fund, that is something
16 that the Court doesn't need to worry about in connection with
17 the Libby issues. It relates to a motion to shorten time by
18 Fireman's Fund in connection with their specific issue. We can
19 take that up at some other point. We don't have to worry about
20 it this morning.

21 These are all Libby specific, and I don't believe
22 that they've actually been ruled on. Some of them relate to
23 matters where Your Honor has already ruled, but these are the
24 motions that say we now want to preclude the evidence. For
25 example, Your Honor has said with regard to Dr. Whitehouse that

1 he can't offer opinions or -- Your Honor has ruled with respect
2 to the opinions that he has offered as to the 1800, but that
3 hasn't translated into a ruling that says he can't offer the
4 following opinions.

5 THE COURT: All right.

6 MR. BERNICK: So there is history on some of these,
7 but I believe that they're all still pending, and we'd be happy
8 to explain that as the issues come up.

9 THE COURT: I think that would be helpful.

10 MR. BERNICK: And with that, the Plan Proponents will
11 call as their first witness, Mr. Inselbuch, and Mr. Finch will
12 be handling that examination.

13 THE COURT: Okay. Just a minute, gentlemen. I'm
14 sorry, I'm having some computer issue and I'm going to have to
15 call staff, because I don't want to lose things in the middle
16 of typing and it just happened again.

17 MR. BERNICK: Okay.

18 THE COURT: So although I apologize, just hold on for
19 a minute please.

20 (Pause)

21 THE COURT: I don't know, Mr. Finch. We'll try it
22 and see. They've given me a suggestion so I'll see what I can
23 do here now.

24 MR. FINCH: Okay.

25 THE COURT: I apologize. Would you call the witness

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1 again please?

2 MR. FINCH: Yes. Your Honor, Nathan Finch on behalf
3 of the Asbestos Claimants' Committee. The Plan Proponents call
4 Mr. Elihu Inselbuch as the first witness.

5 THE COURT: All right, thank you. Mr. Inselbuch --

6 MR. FINCH: And just for Your Honor's information and
7 for other people in the courtroom, we have -- everyone's gotten
8 copies of the exhibits ad nauseam. We have a courtesy copy of
9 the exhibits that we'll use in the direct examination of each
10 of our witnesses. Mr. Inselbuch has a book, you have a book,
11 we gave a copy to Libby claimants.

12 THE CLERK: Please raise your right hand.

13 ELIHU INSELBUCH, WITNESS, SWORN

14 THE CLERK: You may be seated.

15 THE WITNESS: Thank you.

16 THE CLERK: Please use the microphone.

17 DIRECT EXAMINATION

18 BY MR. FINCH:

19 Q Good morning.

20 A Good morning, Mr. Finch.

21 Q Could you state your name for the record please, sir?

22 A Elihu Inselbuch.

23 Q Could you describe your educational background, beginning
24 with high school and continuing through any professional
25 degrees you may have received?

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1 A I graduated from public high school in New York City in
2 1955. I have a bachelor of arts from Princeton University,
3 which I received in 1959, a bachelor of laws from the Columbia
4 University School of Law in 1962, a master of laws in taxation
5 from New York University School of Law in 1965.

6 Q Are you licensed to practice law in any states?

7 A Licensed to practice in New York and in the District of
8 Columbia.

9 Q Are you a member of any federal bars around the country?

10 A I'm a member of the bars, Circuit Courts and a number of
11 the District Courts, of course including the Southern Division
12 of New York and the District of Columbia.

13 Q And you're a member of the Bar of the Supreme Court of the
14 United States?

15 A I am.

16 Q Could you give the Court a brief rundown of your full time
17 employment history beginning with the first job that you had
18 after college and continuing to the present?

19 A After six months serving in the United States Army, I went
20 to work in the legal department of the American Society of
21 Composers, Authors and Publishers. I worked there from 1963
22 until sometime in 1966 doing primarily copyright infringement
23 litigation and any trust litigation that related to the consent
24 decree under which ASCAP functioned.

25 I went to work at first as an associate and later as

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1 a partner at Gilbert, Siegel and Young, a law firm, smaller law
2 firm in New York, from 1966, I was there until 1986. I was
3 doing entirely litigation. The litigation was for the most
4 part related to the clients of the firm and it varied across
5 the board. Some of the work was defending Rolls Royce Motor
6 Cars that were involved in accidents. Some of it Rolls Royce
7 Aero Engines that were involved in accidents. I prosecuted
8 people who infringed Rolls Royce's trademarks. I represented
9 the A.C. Nielsen Company in litigation that involved complaints
10 about the way they did they television ratings.

11 I also had one particular client that the firm did
12 not generally service, the Firestone Tire and Rubber Company
13 for which I did their New York products liability defense for a
14 number of years.

15 I was involved in one of the largest securities fraud
16 class actions, the Homestead Production Company class action
17 that ran from sometime in the middle '70s until the late '80s.
18 Represented a plaintiff's class.

19 I left Gilbert -- and at the very end of my time at
20 Gilbert, Siegel and Young, in the fall of 1985, I was retained
21 to represent what was called the Asbestos Health Committee in
22 the Johns Manville bankruptcy. It's the committee that you
23 think of here as the Asbestos Creditors' Committee. I left
24 Gilbert, Siegel and Young in 1986 and came to Caplin and
25 Drysdale where I'm currently a member.

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1 At Caplin and Drysdale I have over the years done a
2 multiplicity of litigation in various fields, but more and more
3 as I became involved with the Asbestos Plaintiffs'
4 constituency, that began to take up a great deal of my time.
5 Particularly, in the Manville case which ran from 1985 until
6 the Manville plan became effective in 1988, I represented that
7 constituency in class action litigation, the case that became
8 Ortiz in the Supreme Court, an attempt to resolve the
9 fibreboard insurance litigation. And beginning in around 2000,
10 as a number of companies began to file in Chapter 11 as a
11 result of their asbestos liabilities, I became -- is that
12 better?

13 THE COURT: Yes, thank you.

14 A I became largely involved in representing asbestos
15 creditors' committees in those bankruptcies. And here I am
16 today.

17 Q Mr. Inselbuch, you mentioned in your prior answer the
18 Manville bankruptcy. Can you give the Judge just a brief
19 description of what the Manville bankruptcy was about?

20 MR. LEWIS: Objection. Relevancy?

21 THE COURT: What's the relevance?

22 MR. FINCH: Your Honor, the relevance is that the
23 Libby claimants have made a series of objections to the plan of
24 reorganization in this case, and we believe Mr. Inselbuch's
25 testimony about the Manville case and how the Manville plan was

1 originally structured and how it had to be restructured as a
2 result of the failure of the original Manville Trust to
3 adequately deal with the asbestos claims is directly relevant
4 to the questions this Court has to decide, which is, does the
5 plan of reorganization and particularly -- generally and
6 particularly, the trust distribution process provide a
7 mechanism by which similarly situated claimants are treated
8 equally across the board both as between different disease
9 types and presents and futures, many of the objections raised
10 by the Libby claimants are issues that have been considered and
11 dealt with in the Manville case and other asbestos bankruptcies
12 that this Court and other courts around the country have
13 confirmed and approved the plans of reorganization in those
14 cases. And I think therefore the testimony is relevant as a
15 background, not only background, but also some of the
16 explanation directly on point to the objections raised by the
17 Libby claimants.

18 THE COURT: Mr. Lewis?

19 MR. LEWIS: Excuse me. This testimony's entirely
20 irrelevant. The Libby claimants weren't party to any of these
21 proceedings they're going to talk about today. And I think
22 this is just a lecture for the Court from a capable counsel, no
23 doubt, but really it invades the providence of the Court, it
24 wastes the Court's time.

25 THE COURT: I don't know if it will waste the Court's

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1 time, but I don't see the relevance. I think I need to judge
2 this plan on whether this plan meets the standards of the
3 Bankruptcy Code and the 524 injunction. So the objection's
4 sustained.

5 MR. FINCH: Your Honor, the provisions of this plan
6 are modeled in part on the history in other cases. And I
7 believe it is directly relevant to show, to demonstrate why
8 this plan complies with both 1123(a)(4) and 524(g) to hear
9 testimony of Mr. Inselbuch about the issues and concerns raised
10 by the Libby claimants and how that has been addressed in this
11 plan as compared to other plans, and the reasons for that.

12 THE COURT: No. How it's been addressed in this plan
13 is relevant. What relevance it would have to some other plan
14 I don't see. So yes, the testimony concerning this plan is
15 clearly relevant, you may proceed on that basis.

16 MR. FINCH: Well, let's lay the foundation with this
17 plan and maybe we will get into, Your Honor, we could see the
18 relevancy of plans in other cases.

19 BY MR. FINCH:

20 Q Mr. Inselbuch, did there come a time in the late 1990s
21 when you were involved with a company called Fibreboard?

22 A It was the early 1990s, yes.

23 Q Could you describe what the Fibreboard case was about and
24 how -- whether it was a bankruptcy or a class action?

25 MR. LEWIS: Your Honor, I won't object that this is

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1 foundational, but it appears to be irrelevant for the same
2 reasons.

3 THE COURT: What's the relevance, Mr. Finch?

4 MR. FINCH: This goes to the issue of the Grace plan
5 and its use of the bankruptcy process to resolve asbestos
6 liabilities as opposed to something outside of bankruptcy. So
7 if I may have a leeway with a couple of questions, Your Honor?

8 THE COURT: All right.

9 BY MR. FINCH:

10 Q Could you describe briefly the Fibreboard litigation and
11 what that was about?

12 A Fibreboard was a company located in California that made
13 products that subjected it to a substantial amount of exposure
14 for asbestos claims. It had very little by way of assets, but
15 it had two insurance policies that either provided unlimited
16 coverage or no coverage depending on how the Courts construed
17 those policies. The question -- the construction of those
18 policies was being litigated by Fibreboard and its insurers in
19 the State Courts in California. We got involved there on
20 behalf of what became a class of asbestos claimants because we
21 were trying to prevent the all or nothing result that would
22 come from the Supreme Court of California and see whether there
23 could be a settlement achieved.

24 We negotiated a settlement and the objectors to that
25 settlement litigated the matter to the Supreme Court of the

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1 United States. That became the Ortiz case. It followed, soon
2 after the Georgine case was decided by the Supreme Court. And
3 the net effect of those two pieces of litigation satisfied us
4 in the late 1990s that we were unaware of any procedural route
5 outside of bankruptcy that would make it possible to resolve
6 the long tail of asbestos liabilities as between either a
7 defendant, its insurers and claims.

8 THE COURT: Mr. Finch, we've lost the Court Call
9 line. We need to reconnect. So just a second please.

10 MR. COHN: And, Your Honor, while we're dealing with
11 logistics, would it be possible to so arrange things that the
12 witness sounds louder in the courtroom? We're having
13 difficulty hearing up here at the counsel table.

14 THE COURT: As soon as we reconnect the Court Call
15 I'll try to take care of that problem, Mr. Cohn.

16 THE COURT: All right, Mr. Cohn, is that better?

17 THE WITNESS: Is that better?

18 THE COURT: No.

19 THE WITNESS: Is that better? I'll just talk louder,
20 Judge.

21 THE COURT: All right.

22 MR. FINCH: Are we ready to proceed, Your Honor?

23 THE COURT: Yes, thank you.

24 BY MR. FINCH:

25 Q Mr. Inselbuch, following the Supreme Court's decision in

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1 the Fibreboard case, did there come a time in early 2000 when a
2 series of companies started going into bankruptcy to resolve
3 their asbestos liabilities?

4 A Yes.

5 Q And what if any role did you and your law firm play in
6 those cases?

7 A In a number of those bankruptcies where asbestos
8 creditors' committees were appointed, we were engaged as
9 counsel to that committee.

10 Q And did that include the W.R. Grace Bankruptcy Committee?

11 A It did and it does.

12 Q Could you turn in your exhibit book to what has been
13 pre-marked as Exhibit 277.4?

14 A Yes, sir.

15 Q Do you recognize that as the Asbestos PI Trust
16 Distribution Procedures for the W.R. Grace case?

17 A I do.

18 MR. FINCH: Your Honor, the Bankruptcy Plan and all
19 of its exhibits have been pre-marked as Plan Proponents Exhibit
20 277. At this time we would offer the entire plan and the
21 exhibits thereto into evidence.

22 THE COURT: They're admitted.

23 MR. FINCH: We'd also at this time offer Exhibit 276,
24 which is the disclosure statement.

25 THE COURT: It's also admitted.

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1 BY MR. FINCH:

2 Q Mr. Inselbuch, the Libby claimants had an objection based
3 on equal treatment, saying that the way the cases are resolved
4 inside of Libby or for Libby is different or unfair as compared
5 to the way cases are resolved outside of Libby. I'd like you
6 to -- I'd like to focus first on the way that cases outside of
7 Libby are dealt with in this TDP, in this plan, and what that
8 is based on. So could you describe for me, for the Court, the
9 process by which this TDP addresses asbestos personal injury
10 claims?

11 A This document is the latest in a long iteration of trust
12 distribution processes that have developed in these
13 bankruptcies over a number of years. The purpose that it is
14 trying to accomplish is to resolve all present and all future
15 claims as efficiently and inexpensively as possible so that the
16 bulk of the corpus that comes into the trust can actually go to
17 the claimants and not be lost in transaction costs. And to
18 resolve the claims over time more or less as similarly as can
19 be reasonably expected so that we would, in effect, obey the
20 mandate of Section 524(g) which is to pay presents and futures
21 in the same or as similar possible manner.

22 The way this thing works, it provides for two forms,
23 basically, of claims processing. In order to observe the
24 attempt at efficiency, it provides a system called expedited
25 review where if a claimant can satisfy specific criteria for a

1 number of categories, the claimant can get an automatic offer
2 of an award in an amount provided in a matrix that is provided
3 in the document.

4 For those claimants who cannot satisfy the specific
5 criteria of the categories or for those claimants who for one
6 reason or another would like an opportunity to seek a greater
7 amount of compensation, we provide in here what's called an
8 individual review process, under which the trust personnel
9 applied particular criteria that are provided in the document
10 in an effort to reach agreement with a claimant on an amount of
11 compensation.

12 All of these awards of compensation are subject to a
13 sharing, a payment percentage that is determined by experts
14 working for the trust and its constituents in an effort to
15 provide for equal treatment over time among all claimants so
16 that from time to time the trust is required to estimate its
17 potential liabilities, the present value of its potential
18 liabilities, estimate the value of its assets, and thus
19 calculate the amount of basically the percentage that can be
20 paid on claims both present and future. This process is also
21 mandated by Section 524(g) in an effort to ensure that over
22 time, present and future claimants will be treated
23 substantially similar.

24 In an effort further to both make the process more
25 efficient and to make the estimation process possible, there

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1 are constraints placed upon the amounts that any claimant can
2 recover from the trust. If they recover through individual
3 review, we know exactly what they will recover -- I'm sorry, in
4 expedited review, we know exactly what they will recover. If
5 they recover in individual review, there's a maximum provided
6 for that category of claims, beyond which they cannot recover.
7 And there is an average provided for the trusts to seek to
8 obtain an average between what the claims that will be resolved
9 in expedited review and the claims that will be resolved in
10 individual review, so that from time to time the trust will be
11 able to best predict what its ability to pay on a payment
12 percentage basis would be.

13 Now, because we anticipate in individual review that
14 not all claims, not all claimants will be satisfied with what
15 the trust says, they think the fair offer would be, the process
16 permits for an ADR, mediation, arbitration, either binding or
17 non binding arbitration. If the claimant elects non binding
18 arbitration, they can exit to the tort system to further
19 determine how much the amount would be in terms of the
20 liquidated value of their claim.

21 Nonetheless, no matter how that's done, the maximums
22 still control so that the great bulk of claimants will not be
23 subject to what might be the result of some odd outliers
24 throughout the United States which would have an effect on the
25 ability to pay everybody.

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1 The concept is to pay rough justice through these two
2 processes. Hopefully the expectation would be that the
3 overwhelming percentage of claimants would opt for the
4 expedited review process. That has been our experience, and
5 that for those claimants who either cannot satisfy the
6 expedited review process or would seek additional compensation,
7 they can exit to the individual process. That's generally how
8 it works.

9 Q Okay. You mentioned a lot of things in your answer. I'm
10 going to take you through them one by one. The expedited
11 review criteria, could you tell the Judge where in the Grace
12 TDP those provisions are found? And I direct your attention to
13 Page 23 and 24 of Exhibit 277.4.

14 A At Section 5.3, and the criteria, Your Honor, and the
15 categories begin at the top -- it's Section 5.3(a)(3) which is
16 at Page 23, and the disease level categories begin at Page 24
17 and continue through Page 27. In addition, on Page 32 -- 31
18 and 32, there's a table which lists the scheduled values and
19 the average values and the maximum values that I made mention
20 about.

21 Q The expedited review criteria, those are generally medical
22 in exposure criteria?

23 A Yes.

24 Q What is the -- first of all, is expedited review process
25 something that is new to the Grace TDP?

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1 A No. It goes back to the Manville, the 1995 Manville TDP.

2 Q What is the rationale for the expedited review criteria
3 and category? What are they designed to capture?

4 A Well, they're meant to provide bright line criteria for
5 the various disease processes and for exposure requirements.
6 So that they would basically require no debate. They could be
7 administered by a processing department someplace and you could
8 check off these things and it would make the process very
9 simple and inexpensive.

10 What the criteria tried to do is replicate what
11 really is going on out in the world. The diseases are not
12 mysteries. Mesothelioma, we all know what mesothelioma is, we
13 know what lung cancer is, and we have a number of other cancers
14 that medical science says can be in part at least caused by
15 exposure to asbestos.

16 Then we have a series of non-malignant asbestos
17 diseases. And here we've done a certain amount of artificial
18 separation or definitions to try and provide categories for
19 more severely disabled asbestotics or sufferers with pleural
20 disease would be compensated at a higher level. There is no
21 such thing out in the tort system, there are no criteria like
22 that in the tort system, but at the same time, we all
23 recognize that in fact settlements and jury awards reflect how
24 badly injured the particular claimant is.

25 Now that's on the medical side. On the exposure

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1 side, we tried to provide, again, bright line demonstrations of
2 exposure that would be beyond question, so that if a person has
3 the criteria for the disease and has the exposure that is
4 called for underneath the plan, they can automatically be given
5 an award.

6 Q And that concept of expedited review, have you ever had a
7 situation where there was a bankruptcy trust set up where there
8 wasn't expedited review criteria?

9 A Oh yes. The original bankruptcy plan in Manville
10 basically said, come to 30 days or so of an ADR and then exit
11 to the tort system and catch as catch can.

12 Q And how did that work in terms of mechanisms for resolving
13 asbestos claims and seeing that injured people are compensated
14 fairly?

15 A Well, the earliest people in the queue got a substantial
16 amount of the money that was on hand, and after something less
17 than a year and a half, the Manville Trust was out of cash.

18 Q What happened then?

19 A Well, then Judge Weinstein took control of the Manville --

20 MR. LEWIS: Your Honor, this testimony's irrelevant.

21 THE COURT: It's irrelevant, Mr. Finch.

22 Q Mr. Inselbuch, you mentioned the expedited review criteria
23 in the W.R. Grace plan, there's also the process of individual
24 review that you described. Is that something that is new to
25 the Grace TDP as compared to other places?

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1 A No, that's been -- the two processes, expedited review and
2 individual review, began in the 1995 Manville plan and have
3 been in every plan I have worked on since then.

4 Q You said the 1995 Manville plan, are you talking about the
5 class action litigation and restructure of the Manville trust?

6 A Yes.

7 Q And that was the litigation that resulted from --

8 MR. LEWIS: Objection, leading and irrelevant.

9 THE COURT: Mr. Finch, please.

10 Q Mr. Inselbuch, can you describe for us what the individual
11 review process is intended to accomplish in the Grace TDP?

12 A It is to serve two purposes. There will be claims, and
13 there will be some substantial number of claimants perhaps who
14 cannot for one reason or another satisfy the specific criteria
15 that are provided for in expedited review. Yet clearly they
16 are sick and they have been exposed to Grace asbestos products.
17 The channeling injunction in the plan will channel to the trust
18 all claims that have validity -- all asbestos personal injury
19 claims that have validity against Grace. So the trust has to
20 respond to all of those claims irrespective of whether or not
21 they satisfied criteria that we provide for expedited review.

22 So people who for one reason or another can't satisfy
23 the specific criteria or some of the specific criteria can come
24 to individual review and have their particular situations
25 evaluated on a one by one basis.

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1 The other area of individual review is for those
2 cases where for one reason or another, the claimants believe
3 that the amount provided for in the expedited review schedule
4 is insufficient and for one reason or another, they believe
5 their cases merits additional, substantial compensation, and
6 those cases can go through individual review. And criteria
7 provided in the TDP in Section 5.3(b)(2) at Page 30, valuation
8 factors to be considered in individual review that the trust is
9 charged to apply in considering those claims as well.

10 Q If an individual claimant, let's just say hypothetically
11 an individual claimant doesn't meet the expedited review
12 medical and exposure criteria for severe asbestosis, could they
13 not -- what's the scheduled value for severe asbestosis in the
14 Grace plan, Mr. Inselbuch?

15 A Level 4-A, \$50,000 scheduled value.

16 Q And that's also the scheduled value for the severe
17 disabling pleural disease?

18 A Yes, sir.

19 Q Okay, if a claimant doesn't meet the medical and exposure
20 criteria, one or more of them, in the expedited review process
21 for severe asbestosis and it's a non malignant claimant, is
22 there anything in the TDP that would prevent the claimant from
23 being offered a settlement that is equal to the \$50,000 value
24 for severe asbestos through either the individual review
25 process or otherwise?

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1 A No.

2 THE COURT: I think you lost me. There were too many
3 ifs in there.

4 MR. FINCH: Sure.

5 Q If a claimant doesn't meet the expedited review criteria
6 for severe -- let's just say severe asbestosis, is there
7 anything in the TDP that precludes that payment from
8 nonetheless being offered a settlement by the trust that's
9 equal to the \$50,000?

10 A No, quite the contrary. The TDP provides that in those
11 circumstances, the trust can offer a claimant an amount up to
12 that scheduled value if the trust is satisfied that
13 notwithstanding, the failure to meet the particulars of the
14 categories in the classifications, the claimant is indeed
15 suffering from that disease.

16 Q Okay.

17 THE COURT: I'm sorry. I lost it. If they don't
18 meet the criteria for the disease, the trust can still settle
19 for the maximum amount that says that they've met the criteria
20 for the disease?

21 THE WITNESS: Up to that.

22 Q Through what process, Mr. Inselbuch?

23 A Well, this would, again, be through individual review.
24 The idea here is, some claimants might -- take a look, Your
25 Honor, at Page 26 and lets look at severe asbestosis. There

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1 are lots of medical criteria here. And let's assume that
2 instead of measuring a TLC of less than 65 percent, they meet
3 all the other criteria, but the measurement is 70 percent. The
4 trustees might still consider that that person has satisfied
5 this criteria for disease, because they recognize that the
6 scores that are reflected here are variables that depend upon
7 people and how young they are, how old they are and what
8 averages are using in calculating these numbers. That's just
9 an example.

10 On the other hand, they might, if the claimant missed
11 more than one of these characteristics, the trustees might say,
12 well, you're a lot sicker than somebody down in level three,
13 but you're not really up to this level 4-A, we will offer you
14 an amount that is less than \$50,000, but substantially more
15 than 7500.

16 MR. LEWIS: Your Honor, I move to strike the
17 testimony on the grounds that it is nonresponsive to the
18 question. I think the question was, through what process would
19 they arrive at this \$50,000 amount without satisfying the
20 particulars of the TDP.

21 THE COURT: I think the answer to that question was
22 through the individual review process, which is --

23 MR. LEWIS: I didn't hear that, but if that, if the
24 witness can confirm that, I'll withdraw my objection.

25 THE WITNESS: Yes.

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1 Q Okay. Just to be clear, the expedited review process is
2 if in the pieces of paper that the claimant submits to the
3 trust, you can say, yes -- let's take severe disabling pleural
4 disease -- yes, you have a diagnosis of pleural thickening that
5 meets the ILO requirements, yes you have TLC less than 65
6 percent, that would get the scheduled value offered, is that
7 right?

8 A Yes, sir.

9 Q And if on the other hand you had someone come into the
10 trust that says I've got severe pleural disease, I'm really
11 sick, but they don't meet the ILO requirements let's say, is it
12 possible for that claimant in the individual review process to
13 persuade the trust and the trust nonetheless offer them a
14 scheduled value amount up to the \$50,000?

15 A Yes.

16 Q Okay. And is that concept of individual review, the
17 individual review process, is that something that is created
18 for the first time in this case?

19 A No, it's been this way since the 1995 Manville TDP and in
20 every case where I've been involved.

21 Q Okay. You talked about the individual review process and
22 the expedited review process. Can you describe the -- and
23 focusing on for claims outside of Libby for right now and for
24 things that are not Libby specific, can you focus on, can you
25 describe for the Court where the medical and exposure criteria

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1 for the expedited review process came from?

2 A The medical criteria came from a combination of the
3 knowledge that the personal injury bar has of the medical
4 criteria for these diseases, plus consultations with medical
5 advisors. The exposure criteria came from discussions among,
6 originally among the personal injury bar in order to provide
7 these various categories and with ultimately representatives of
8 the other constituencies in each of these Chapter 11s.

9 Q Okay. Are the exposure and medical criteria in expedited
10 review procedures in the W.R. Grace plan, any of them new and
11 different for this case?

12 A Yes. Based on discussions that we had with the Libby, the
13 lawyers who represent the Libby constituency, they took the
14 position with the rest of the asbestos creditors committee that
15 there was a disease process that was common in Libby that they
16 call or is described as severe disabling pleural disease, and
17 that the TDP, as written previously, did not provide for that
18 disease. We consulted, the committee consulted with its
19 medical experts who confirmed the existence in the literature
20 of this disease, although it was apparently unusual to observe
21 in practice. But because it existed in the medical literature
22 and because the Libby claimants took the position that people
23 from Lincoln County, Montana suffered from this process, we
24 added a new disease level to the TDP to provide for severe
25 disabling pleural disease, which is now Level B.

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1 Q That's Category -- Level 4-B and it's found on Page 26 of
2 the TDP, is that right, Mr. Inselbuch?

3 A Yes.

4 Q Okay. Well, we'll come back to the severe disabling
5 pleural disease in a little bit more detail in a moment. I
6 want to ask you about some other things you mentioned that the
7 TDP does and have you describe the rationale for them. You had
8 mentioned in your answer that there are limits or caps on the
9 maximum amount of money that a claimant can recover from the
10 trust, do you recall that testimony?

11 A Yes.

12 Q Can you describe to the Court what those caps are and what
13 they're intended to accomplish?

14 A First, you have to understand that when we set the
15 schedule of values what we are trying to capture based upon our
16 experts' analysis of, in this case, the Grace litigation
17 history, is the Grace several share of the liability for each
18 disease process. In the tort system there is joint and several
19 liability, but what we tried to provide here is what Grace's
20 share of that liability is as reflected by its settlement
21 history.

22 The maximums, again, as related to the particular
23 disease process were recommended to the Committee by its
24 experts to reflect an order of magnitude higher than the
25 scheduled values that would probably include something like 70

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1 to 80 percent of the claimants throughout the country. We were
2 setting a maximum to cut off the what we regarded as the
3 outlier cases. Cases that most folks would say received
4 compensation well beyond what the norm should be for that
5 disease process as a result of the vagaries of the tort system.

6 So we have the schedule value providing the several
7 share of liability for Grace, historically set at a number just
8 above the midpoint of the historical history in an effort to
9 encourage people to opt for the expedited review process. And
10 we have the maximums to permit for recovery up to fairly
11 substantially higher numbers, but still cutting off the upper
12 end of what we would call the outliers.

13 Q And who was the expert that gave advice to the Committee
14 on the values that appear in the TDP?

15 A Dr. Mark Peterson.

16 Q And could you describe just briefly what Dr. Peterson's
17 background is and the role he has played for the Grace Asbestos
18 Claimants' Committee?

19 MR. FINCH: You'll hear from Dr. Peterson later
20 today, Your Honor, but Mr. Inselbuch can describe briefly who
21 he is and what he does.

22 A Well, Dr. Peterson has been involved in these particular
23 issues, the resolution of asbestos related bankruptcies back to
24 the Manville restructuring litigation in 2000 -- in 1990 when
25 he was appointed by Judge Weinstein as a special advisor to the

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1 Court. Since then, he has been engaged by numerous of the
2 Asbestos Creditors' Committees for the purpose of doing
3 estimates of the Grace liabilities -- the debtors' liabilities
4 -- to provide the input that would become the scheduled values
5 here, to participate in the negotiations that lead to the
6 initial payment percentage with the futures representative and
7 other constituencies, and generally to give advice on the
8 claims' history and its significance to the Committee.

9 Q You mentioned that the caps, the maximum amount the
10 plaintiffs can receive under this TDP, is that something that
11 is new to this TDP?

12 A No.

13 Q And has it been modeled on other things?

14 A It's been around since the first iteration in 1990.

15 Q The first iteration of what?

16 A Of the attempt to restructure the Manville plan.

17 Q Is there an opportunity for claimants, if they disagree
18 with the Trust's settlement offer or its categorization of
19 which disease their claim falls into to have that dispute heard
20 by a jury?

21 A Yes. I think I said that they can opt for -- they first
22 go through an ADR process of mediation and arbitration. The
23 arbitration can be binding or non-binding. If they elect
24 non-binding and they're still dissatisfied, they can exit to
25 the tort system and have a jury decide either whether or not

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1 they satisfied the categorization provisions in the TDP or the
2 amount of entitlement in individual review, up again to the
3 maximum numbers.

4 Q So if, for example, a claimant who says they have severe
5 pleural disease goes through, doesn't meet the expedited
6 review process and goes through the individual review process
7 and the trust doesn't agree with them, what, if anything can
8 that claimant do in a jury trial?

9 A Can put on whatever proofs that they would have that
10 within the criteria that are provided for individual review
11 that I mentioned before.

12 Q What are you referring to when you say -- you're focusing
13 on Section 5.3(b) of the TDP?

14 A Yes.

15 Q 5.3(b)(2), the factors are laid out, they can put on proof
16 that are within the factors provided for in the TDP and a jury
17 -- and so will the Trust, presumably -- and the jury will
18 decide then applying those factors, what the value would be.

19 Q Subject to the caps and the maximum you can get?

20 A Yes, sir.

21 MR. FINCH: Could you put Exhibit 277.04 on the
22 screen?

23 Q Focusing your attention on Page 58 and 59 of the TDP, Mr.
24 Inselbuch.

25 A Yes?

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1 MR. LEWIS: Counsel, could you provide the Plan
2 Proponents Bates stamp number? I don't have that marked.

3 MR. FINCH: It's Plan Proponents Bates Stamp Number
4 14571 and 14572.

5 MR. LEWIS: Thank you, sir.

6 MR. FINCH: It will be Sections 7.6 and 7.7.

7 Q Are those, Mr. Inselbuch, are those the provisions of the
8 TDP that describe and govern the rights to a jury trial and the
9 cap on the amount of judgments?

10 A Yes.

11 Q Does the cap on the judgments only apply to the Libby
12 claimants or does it apply across the board?

13 A It applies to all claimants.

14 Q As part of your work in this case and other asbestos
15 bankruptcies, have you become familiar with the size of
16 verdicts in the tort system from time to time?

17 A I'm sorry, I didn't hear the question.

18 MR. LEWIS: Excuse me.

19 Q Sure. Have you become familiar -- well, let me rephrase
20 the question. Does the cap, in your view, impact the claimants
21 from Libby unfairly as compared to other claims?

22 MR. LEWIS: Objection. That calls for an opinion
23 evidence. This witness is not identified as an expert and
24 in his deposition testified he would not testify as an expert
25 and his counsel also made that clear in his deposition.

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1 Furthermore, that invades the providence of the finder of fact.

2 MR. FINCH: We'll get to it with Dr. Peterson, then,
3 Your Honor.

4 THE COURT: All right.

5 Q The -- does the Grace TDP allow for the payment of
6 punitive damages?

7 A No.

8 Q What is -- is that something that's new to this case?

9 A No.

10 Q What's the rationale for that?

11 A Well, the goal in all of these programs since at least the
12 Manville restructuring was to develop a process where the
13 presents and the futures would be paid as substantially the
14 same as possible. If you permitted for some early entrance in
15 the cue to receive punitive damages, you would deplete the
16 resources early on and to the detriment of the people at the
17 end of the cue. Moreover, the claims now are channeled to a
18 trust. There would seem to be no purpose in the law to award
19 punitive damages against the trust which engaged in no conduct
20 itself that had anything to do with the damage that the
21 claimants have suffered, so there would be no deterrent effect
22 that would be the utility of punitive damages. So either to
23 protect the pro rata share concept or because there's no
24 particular purpose in having punitive damages, we have not
25 permitted for punitive damages to be awarded --

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1 Q Did they --

2 A -- to be included in the compensation.

3 Q Does the elimination of punitive damages apply only to the
4 Libby claimants?

5 A No, it applies to everybody.

6 Q Do other -- had other claimants alleged punitive damages,
7 the right to punitive damages against Grace?

8 A Oh, sure, throughout the country claimants had alleged and
9 some had been awarded punitive damages.

10 Q The --

11 A I'm not sure if I could recite on whether or not there
12 actually had been an award of punitive damages against Grace in
13 particular.

14 THE COURT: All right.

15 MR. LEWIS: I could not hear that, Your Honor. I
16 apologize.

17 THE COURT: Could you restate what you just said, Mr.
18 Inselbuch?

19 THE WITNESS: Sure. Mr. Lewis, I just wanted to
20 correct my last answer. I couldn't recite, as I sit here
21 today, a specific case where punitive damages were awarded
22 against Grace. I believe there were, but I couldn't, if asked
23 about it, I couldn't tell you today.

24 MR. LEWIS: Thank you.

25 Q The -- another thing you mentioned as part of the

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1 individual review process is to account for situations where
2 the amount of money in the schedule of value may not be enough
3 for whatever reason. Are you familiar with something in the
4 Grace TDP called the concept of extraordinary claims?

5 A I am.

6 Q Could you describe to the Court what the goal behind the
7 extraordinary claims provision is in the Grace TDP?

8 A The extraordinary claims provision has been in these TDPs,
9 again, since at least the 1995 Manville plan. It's to take
10 account for the -- what are relatively unusual situations where
11 a claimant really is only able to collect from, in this
12 particular situation, Grace. As I said before, the categories
13 in the schedule of value provide Grace's several share on the
14 assumption that the claimant would have claims for liability
15 against a number of other defendants in the tort system. But
16 there are situations and originally it was brought to mind in
17 Manville that there were people who worked at the Manville
18 plant in Manville, New Jersey, as it happened, and they would
19 have claims against no one other than Manville. So we had to
20 provide a category, a treatment for those folks to provide a
21 multiple, up to a multiple of recovery where that would be the
22 case.

23 So the extraordinary claims provision typically
24 provided, and does here as well, that if the exposure to the
25 product is at least 75 percent for this particular debtor, then

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1 the recovery, the maximum that could be recovered in individual
2 review is multiplied by five to provide more room for a higher
3 payment to that claimant. We changed -- we added to the
4 extraordinary claims provisions. You asked me before what's
5 different in this TDP. The extraordinary claims provision was
6 changed to take account for arguments that the Libby
7 constituency was making. They said, well, our exposure is
8 almost entirely to Libby, to Grace product. We're well beyond
9 the 75 percentage. We think -- and we think our recoveries are
10 substantially higher than other people get around the country.

11 So after a certain amount of give and take on that,
12 the committee included a provision that says if the exposure is
13 at least 95 percent Grace, then the multiple can be as much as
14 eight times. In either case, whether it's five times or eight
15 times, the document says that cannot be the likelihood -- there
16 has to be little likelihood of recovery somewhere else from
17 some other tortfeasor in order to qualify for extraordinary
18 treatment.

19 Q Can you show Exhibit 277.4 on the screen and Page 32?
20 Directing your attention, Mr. Inselbuch, to Pages 32 and 33 of
21 the Grace trust distribution procedures, is that where the
22 extraordinary claims --

23 A Yes, sir.

24 Q -- provisions are found?

25 A Yes, sir.

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1 Q In the individual review process, is it possible -- is
2 there anything in the TDP that would prevent a claimant who
3 doesn't meet the medical criteria for severe disabling pleural
4 disease to, nonetheless, receive a \$400,000 settlement offer
5 from the trust if they can prove extraordinary exposure?

6 A No.

7 Q And that would be just the same as the other individual
8 review process we talked about before?

9 A Correct.

10 Q And is it correct that Section 5.3(b)(1) is the place in
11 the TDP that's on Page 29, is the place in the TDP, (b)(1) and
12 (b)(2) that describes the individual review process?

13 A It begins on Page 27 and it runs through some place on
14 Page 31.

15 Q Okay. Now, you mentioned --

16 A You had asked me what are the changes we made and I never
17 finished that answer.

18 Q That's what I was getting to next.

19 A All right.

20 Q So, Mr. Inselbuch, what changes were made to the Grace TDP
21 in an attempt to accommodate the concerns of the Libby
22 claimants?

23 A Well, first, as I testified, we created this new category,
24 4(b), for severe disabling pleural disease. Second, we
25 provided, as I've testified, this additional category of

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1 extraordinary claims treatment. Third --

2 Q You mean you increased the multiple from five to eight?

3 A Yes, we provided this additional extraordinary claims
4 treatment provision. The five is still there. The eight is an
5 additional tester. We also modified the exposure requirements
6 in some of these categories to take account for the fact that,
7 as described to us, the Libby exposure was not in many
8 situations industrial exposure. And the exposure criteria in
9 these categories in a number of places require something called
10 significant occupational exposure which is on the job working
11 with asbestos fibers or in the close proximity to someone else
12 working with asbestos fibers that will get you exposed.
13 Because a lot of the Libby exposure, as it was described to us,
14 was not of that nature, we modified the exposure requirements
15 to accommodate claimants whose claims arose in Lincoln County,
16 Montana in that respect.

17 We also, because they -- it was explained to us by
18 the Libby folks that their pleural disease was progressive, we
19 provided a second opportunity to come back and claim for Level
20 4B which is severe disabling pleural disease even after first
21 recovering in Level 3, which had not been the case in other
22 TDPs.

23 Q Could you explain how that works? Well, first of all,
24 where in the TDP is that comeback right found?

25 A Second diseases.

1 Q All right. Attention -- direct your attention to --

2 A 5.9, Page 44. Many jurisdictions take the view that
3 cancer is a second disease, a different disease from
4 non-malignant asbestos disease. So these TDPs recognize that
5 someone could have a claim for non-malignant asbestos disease
6 and sometime later succumb to a malignant asbestos disease, and
7 the TDPs have historically and this TDP provides for what we
8 call comeback rights. You can then file another claim for the
9 second disease. We have added here in order to accommodate the
10 Libby claims a comeback right from Level 3 to Level 4 even
11 though it's not perhaps a new disease. We thought that they
12 should have an opportunity since they say that these diseases
13 are progressive and over a period of time to first seek
14 whatever the lower level of compensation might be and then come
15 back again if they then succumb to more severe problems.

16 Q So, in other words, someone from Libby could settle their
17 case at Category 2 or Category 3 and then if they get sicker,
18 they would be entitled to come back and to present a claim for
19 the severe pleural disease.

20 A Yes, sir.

21 Q You mentioned in your earlier testimony that the severe
22 disabling pleural disease category was something new that was
23 added at the request of the Libby claimants and that you had
24 consulted with the ACC's medical expert about that. Could you
25 describe for the Court who the ACC's medical expert is and how

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1 that process worked?

2 A The expert is Dr. Laura Welch who's in the courtroom and
3 basically we asked her to provide to the committee a --

4 MR. LEWIS: Your Honor, excuse me, I must object. In
5 his deposition, this witness testified that he had no personal
6 knowledge of the consultation with the doctor. So I'd like
7 some foundational testimony to show that he himself has
8 personal knowledge of what these consultations were, please.

9 THE COURT: All right.

10 MR. FINCH: I'll lay a foundation.

11 Q Mr. Inselbuch, were you the person from Caplin & Drysdale
12 who was principally responsible for the TDP in this case?

13 A Yes.

14 Q Did you have a conference call with Dr. Welch and members
15 of the Grace committee to discuss Libby medical issues?

16 A Yes.

17 Q Did -- in that conference call, did the -- did you provide
18 any directions to Dr. Welch?

19 A Dr. Welch was asked to recommend to the committee if we
20 adopted this concept of severe disabling pleural disease what
21 the touchstone criteria would be like the other criteria that
22 would be ready markers for awarding this compensation. She
23 provided that and that's what's in the TDP.

24 Q Okay. You've mentioned four ways in which the TDP has
25 been changed from what I'll call the state of the art TDP to

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1 accommodate the Libby claimants, the creation of the new severe
2 disabling pleural disease category, the relax of the definition
3 of Grace exposure to account for their community exposures, the
4 creation of a new eight times extraordinary claims multiplier,
5 and the creation of comeback rights or second disease rights as
6 between the non-malignant disease categories so if they did
7 progress to the severe pleural disease they would be entitled
8 to come back for another claim. Were there things that the
9 Libby claimants are objecting to in the plan of reorganization
10 now that were not changed in the Grace TDP?

11 A Yes.

12 Q Can you describe those things to the Court?

13 A Well, first in the criteria that are provided for severe
14 disabling asbestos pleural disease, the Libby claimants
15 objected to a number of the requirements that Dr. Welch had
16 recommended that the committee provide for in the document.
17 Those included definitional provisions that Dr. Welch
18 recommended that had to do with the thickness of materials,
19 that had to do with tests that measured lung capacity that had
20 to do with something that had -- that was observable on x-ray
21 and a number of medical issues that are not my area of
22 expertise. We took whatever the Libby folks wanted to do, took
23 it to the medical consultant. And when the -- if the medical
24 consultant said it was inappropriate to do it that way, at
25 least in providing criteria that would provide for automatic

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1 compensation, we acted on the advice of the medical consultant.

2 The Libby folks also had difficulty with what we had
3 done with extraordinary claims provisions. It was their view
4 that the multiplier should not be a maximum, an expansion of
5 the available amount that could be awarded to a particular
6 claimant based upon the criteria in the TDP, but rather for at
7 least the claimants from Lincoln County, Montana, it should be
8 an automatic award of that multiple for their clients
9 irrespective of how they would satisfy the particular factors
10 that are considered in individual review. The committee did
11 not view that as appropriate because we thought that the Libby
12 folks, Libby claimants, as best possible, should be treated in
13 the same manner as claimants throughout the country and the
14 world for that matter.

15 They also took the view that they should be excused
16 from the provision in the extraordinary claims provisions that
17 require that there be little likelihood of recovery elsewhere.
18 We -- the committee declined to adopt that, as well, because
19 the theory of the extraordinary claims provision is, in fact,
20 that the claimant should be entitled to a greater award because
21 they have little likelihood of success in collecting money
22 elsewhere.

23 Q Does the -- did the Libby claimants have complaints about
24 the values in the TDP that were not accepted?

25 THE COURT: I'm sorry, I didn't understand the

1 question.

2 Q Sure. Were there -- let me back up. The settlement
3 averages in the TDP, are they jurisdiction specific or are they
4 intended to capture sort of something else?

5 A You mean the category values --

6 Q The category values, the schedule values and the --

7 A -- in expedited review?

8 Q -- and the schedule values and the average values.

9 A They are not jurisdiction specific. They are designed to
10 capture a number that is a bit above the 50 percent mark for
11 settlements historically that Grace entered into throughout the
12 country.

13 Q Does the Grace trust distribution procedures provide
14 different amounts of payment based on -- let me back up. How
15 does the Grace plan deal with the treatment of insurance
16 proceeds?

17 A Well, under the plan, if there is unsettled insurance at
18 the end of the confirmation process, that -- the rights to that
19 unsettled insurance are conveyed to the trust. To the extent
20 that there is settled insurance that may be in the form of
21 insurance in place or something akin to that, that is similarly
22 conveyed to the trust. If there are settlement proceeds that
23 arose after a certain date which I don't recall offhand, those
24 proceeds also come to the trust.

25 Then the trust merges those assets with all the other

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1 assets that it has under the plan in order to calculate the
2 total value of its assets so that a payment percentage can be
3 determined, and then it applies that payment percentage across
4 the board to all claimants, irrespective of the particular
5 pattern of exposure that any individual plaintiff might have
6 had, historically claimant might have had, which would have --
7 might have triggered one or another or some policies, but not
8 other policies. But, basically, we take the assets as a whole
9 and apply then evenly to all claimants.

10 Q How does the Grace TDP deal with the fact that there might
11 be different amounts of insurance available depending on what
12 the claimants' individual facts are?

13 A I just thought I answered that.

14 Q Well, you answered how it was put in the pot. I guess is
15 there anything in the TDP that would provide a different amount
16 of money --

17 A Oh.

18 Q -- to a claimant depending on how much insurance the trust
19 could access?

20 A No. As I said, we don't look at each claimant's footprint
21 in the tort system to see what policies might or might not have
22 been triggered. This is another objection that the Libby
23 constituents have made to the plan that we considered at the
24 committee. They take the view that at least with respect to
25 certain unsettled insurance that their claimants can trigger --

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1 could trigger greater recovery from those policy or policies
2 and, thus, they should be entitled to a greater distribution on
3 account of that from the trust.

4 Q Could you describe to the Court how the Grace TDP deals
5 with loss of consortium or wrongful death claims?

6 A The concept of the TDP is that there is one claim, one
7 injury. Various state laws will carve up rights to collect
8 because of that injury among various entities. We have, of
9 course, the injured party himself or herself. We have
10 potentially loss of consortium claims. If the person dies,
11 there are wrongful death claims. There are -- and sometimes
12 the estate under state law has the wrongful death claim,
13 sometimes some heirs do, sometimes there are rights in
14 survivors. But from the standpoint of the TDP, there is only
15 one injury and we -- the trust pays once to cover all of those
16 claims.

17 Q Is there anything in the individual review process
18 provisions that discuss concepts that would be applicable in a
19 wrongful death or consortium claim, directing your attention to
20 Page 30 of the TDP?

21 A Well, the fact of a victim's family existence will affect
22 the value of the claim if they have more dependants, if they
23 have a widow or a widower, if -- all of those things can affect
24 the value of the claim and the criteria include that, the
25 valuation factors in individual review. But what I was saying

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1 before is after you have determined what the value of that
2 claim is, it's one claim for one injury and the trust pays
3 once.

4 Q And how does the trust deal with situations where, first
5 of all, the way that the trust deals with the consortium
6 claims, the Grace trust and the Grace TDP, is that something
7 new and different in this case or is that something that
8 existed before?

9 A No, it's the same as it's been since 1995.

10 Q And is the way that the trust deals with wrongful death
11 and consortium claims something that is unique or specific to
12 Libby?

13 A No.

14 Q It affects consortium claims around the country the same
15 way as it would in Montana?

16 MR. LEWIS: Objection, leading. There's lots of
17 leading questions here, but he's getting -- going too far now,
18 Your Honor.

19 Q Okay. Could you describe how the trust would deal with
20 the situation if there were either a consortium claim or claims
21 by dependants that it was unable to get a release from at the
22 time it settled the case?

23 A Well, first of all, this trust is not a --

24 MR. LEWIS: Objection, that's a compound question, I
25 think, Your Honor. I didn't understand it.

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1 Q Would you describe the process how the trust would deal
2 with a situation if it had a consortium claim where it couldn't
3 get a release?

4 A First of all, the trust is not in existence yet, so I can
5 only testify to the way other trusts operating under similar
6 provisions have handled this. It's no different from --

7 MR. LEWIS: Objection. He's just established that he
8 can't lay foundation for -- to answer the question.

9 THE COURT: Sustained.

10 Q Mr. Inselbuch, do you have experience with how other
11 trusts deal with that situation?

12 A Yes.

13 Q And how is it that you came to have that understanding?

14 A Under the terms of this TDP and all the other TDPs, an
15 entity is created called the trust --

16 MR. LEWIS: Objection. The answer is not responsive
17 to the question, Your Honor.

18 THE COURT: Sustained.

19 MR. FINCH: Your Honor, I was asking him how is it
20 that he came to know how other trusts deal with consortium
21 claims and he was answering that --

22 THE COURT: It's irrelevant, Mr. Finch. Let's get to
23 this one.

24 Q Is there anything in the TDP or the trust document that
25 would preclude the payment of a consortium claim by the trust?

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1 A No. The documents provide for the generation of releases.
2 This document does so that when they pay a claim they get the
3 necessary releases to resolve whatever claims exist or they're
4 empowered to.

5 MR. FINCH: Your Honor, I'd like to confer with my
6 colleagues just for a minute. I think I might be done, but I
7 just want to --

8 THE COURT: Yes, I have one question, too, so if I
9 may ask it before you go. Mr. Inselbuch, you indicated that
10 the average settlement values include something that's slightly
11 above the 50 percent value basically for what debtor has -- the
12 debtor has settled its tort liabilities for. Does that include
13 the Libby settlements --

14 THE WITNESS: Yes, they're all --

15 THE COURT: -- in that 50 percent number?

16 THE WITNESS: Yes, it would, but in fairness, Your
17 Honor, the Libby numbers, because they're a relatively small
18 number of folks, will have a very small effect on the national
19 values that are involved there.

20 THE COURT: All right. Thank you.

21 MR. FINCH: May I confer with my colleagues?

22 THE COURT: Yes.

23 (Pause)

24 THE COURT: All right. Folks, I'm being advised that
25 some people who have entered appearances did not sign in, so my

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1 court recorder does not know who you are. Please provide her
2 with a card and sign in the list when you have -- when we have
3 a break. And, also, while they're conferring, I should make
4 this announcement. We have a staff person who will be sitting
5 outside the door every morning from eight until nine so that if
6 anyone wants to order CDs of the transcript for that day,
7 please do it in the morning. Otherwise, we will not be able to
8 make copies by the time staff has to leave that night. So you
9 won't be able to get them that night when court is done unless
10 you order them that morning before court starts. So there will
11 be a staff person outside the door every morning for anyone who
12 wants to order a CD.

13 MR. BERNICK: Your Honor, while Mr. Finch is
14 conferring with Mr. Lockwood, Your Honor addressed relevance
15 objections that were posed as to testimony that would have been
16 offered regarding the experience with the Manville trust and
17 the experience with the Owens Corning or Fibreboard settlement
18 program. And just to be clear, the Libby claimants have made
19 their equal treatment objection. There are also objections
20 that have been made regarding the need for a channeling
21 injunction, including objections by them. I am taking Your
22 Honor's rulings with regard to relevance to be focused on the
23 relevance of Manville and Fibreboard to the issue of equal
24 treatment that the Libby claimants have raised. Obviously, our
25 burden is to establish the need for five -- you know, whether

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1 this plan serves the goals for 524(g) and whether those goals
2 could be accomplished in some other fashion. And you're not
3 ruling on the relevance of Manville and Fibreboard to the issue
4 of the importance of the channeling injunction.

5 THE COURT: No, I'm ruling that whether or not
6 Manville and Fibreboard resolve their own individual asbestos
7 liabilities in a particular way is not relevant to how Grace
8 resolves its asbestos liabilities.

9 MR. BERNICK: Well --

10 THE COURT: We're in a bankruptcy. We have a plan.
11 The question is whether this plan equally treats, if that's the
12 appropriate standard, that's the objection, equally treats the
13 Libby plaintiffs. It doesn't matter whether Manville did it,
14 it matters whether this plan does it.

15 MR. BERNICK: I understand. And that's why I say
16 equal treatment. I understand the Court's ruling would relate
17 to equal treatment. We also have a burden, though, with
18 respect to this plan to establish that the channeling
19 injunction, in fact, serves the purpose of achieving the goals
20 of 524(g) and whether they can be achieved in some other way --

21 THE COURT: Why do you have to show whether they can
22 or can't be achieved in some other way?

23 MR. BERNICK: -- well, it's the importance of the
24 channeling injunction.

25 THE COURT: I don't -- all right. Perhaps --

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1 MR. BERNICK: Well, we'll just --

2 THE COURT: -- I'm missing the significance of the
3 importance of the channeling injunction. Somebody's going to
4 have to give me a very detailed brief about why the channeling
5 injunction would not be important in the context of this case.

6 MR. BERNICK: I understand that --

7 THE COURT: Eight years down the road I think the
8 channeling injunction is important as a matter of law --

9 MR. BERNICK: Oh, okay.

10 THE COURT: -- if not a matter of fact. So somebody
11 raising an issue --

12 MR. BERNICK: Fine.

13 THE COURT: -- give me a very detailed brief --

14 MR. BERNICK: I understand.

15 THE COURT: -- because otherwise I'm not going there.

16 MR. BERNICK: Okay. Got it.

17 THE COURT: Mr. Finch, are -- I'm sorry, Mr. Lewis,
18 did you have a comment on --

19 MR. LEWIS: No, I thought he was done. I was going
20 to ask for a break. I need a break.

21 THE COURT: We -- as soon as Mr. Finch is finished
22 we'll take a break.

23 MR. FINCH: I'll be done in less than two minutes,
24 Tom. I promise.

25 MR. LEWIS: That's perfect. I can survive that long.

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1 BY MR. FINCH:

2 Q Mr. Inselbuch, can you tell us whether or not the same
3 process for resolving asbestos personal injury claims applies
4 to both Libby claimants and people outside of Libby in the
5 Grace TDP?

6 A Yes, sir, it does.

7 Q And is -- are the expedited review medical criteria
8 designed to capture everyone who might possibly have an
9 asbestos related disease?

10 MR. LEWIS: Objection, leading.

11 THE COURT: Well, it's been asked and answered.

12 MR. FINCH: With that, Your Honor, I would just make
13 an offer of proof of some additional documents which I think
14 Mr. Lewis will all object to on relevance, but let me just
15 offer them so I can have a record. The plan proponents would
16 offer Plan Proponents Exhibit 31 which were the claims
17 resolution procedures in place at the time the Manville trust
18 first began resolving asbestos claims at the conclusion of the
19 Manville bankruptcy in 1988. Is the only basis of the
20 objection relevance, Mr. Lewis?

21 MR. LEWIS: Yes, sir.

22 THE COURT: All right.

23 MR. FINCH: We offer that.

24 THE COURT: The relevance objection is sustained.

25 If, in fact, it turns out later that something is relevant, you

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1 certainly may re-offer, but as I understand the record right
2 now, I see no relevance.

3 MR. FINCH: Okay.

4 THE COURT: The objection is sustained.

5 MR. FINCH: Thank you. Plan Proponents Exhibit
6 Number 66, Your Honor, is the 1995 Manville TDP that was
7 created at the end process of the class action litigation to
8 restructure the Manville trust. We offer Exhibit 66.

9 MR. LEWIS: Objection, relevance. It is offered for
10 the truth of the matter stated therein?

11 MR. FINCH: Your Honor, we don't think the hearsay
12 objection applies. We're not offering -- the document is part
13 of a contract. It's part -- it's a verbal act. It's not
14 offered for the truth. It is what it is. It creates a legal
15 relationship between the beneficiaries of the Manville trust
16 and the Manville trust. It's not -- it doesn't fit the --

17 THE COURT: What's the relevance here? This isn't
18 Manville. This is Grace.

19 MR. FINCH: Your Honor, this is --

20 THE COURT: Why do I need to get into Manville?

21 MR. FINCH: Your Honor --

22 THE COURT: Other courts have litigated Manville.

23 MR. FINCH: -- I'm not rearguing the relevance
24 objection, I'm just addressing Mr. Lewis's hearsay objection.
25 It's --

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1 MR. LEWIS: I understand you're making an offer of
2 proof and I didn't mean to interrupt that. My objection is
3 relevance and hearsay.

4 MR. FINCH: Okay. As to the relevance, I understand
5 Your Honor has ruled. Would you like to hear the argument on
6 the hearsay objection?

7 THE COURT: Not at this time.

8 MR. FINCH: Okay.

9 THE COURT: If it ever becomes relevant, I'll hear it
10 then.

11 MR. FINCH: Okay. Thank --

12 THE COURT: The objection is sustained on the grounds
13 of relevance.

14 MR. FINCH: Thank you. Exhibit -- the plan
15 proponents would also offer Plan Proponents Exhibit 137 which
16 is the 2002 Manville TDP.

17 MR. LEWIS: Objection, relevance and hearsay.

18 THE COURT: All right. I'm not ruling on hearsay.
19 That's not before me. I'm ruling on relevance at this point
20 and only on relevance. It's not admitted because at this point
21 I see no relevance.

22 MR. FINCH: Okay. The plan proponents would offer
23 Plan Proponents Exhibit 141 which is the trust distribution
24 procedures filed with a proposed plan of reorganization in the
25 summer of 2002 in the Babcock & Wilcox bankruptcy proceedings.

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1 MR. LEWIS: Same objection, relevance.

2 THE COURT: Mr. Finch, what --

3 MR. FINCH: Your --

4 THE COURT: -- is the purpose?

5 MR. FINCH: Your Honor, I'm making an offer of proof.

6 My last document is --

7 THE COURT: You haven't even mentioned Babcock &

8 Wilcox, so what is the proffer for?

9 BY MR. FINCH:

10 Q Mr. Inselbuch, were you counsel to the Babcock & Wilcox
11 committee?

12 A Yes, sir.

13 Q Was the TDP in the Babcock & Wilcox case in 2002 the first
14 one that was filed with a court somewhere to address the new
15 wave of asbestos bankruptcies of which the Grace case was a
16 part?

17 A Yes, sir.

18 MR. LEWIS: Objection, leading, also, Your Honor.

19 THE COURT: That's sustained.

20 Q What was the Babcock 2002 TDP?

21 A It was the first generation of TDPs that were crafted
22 after the wave of bankruptcies that came in 2000 that modified
23 what had been the Manville criteria, both with respect to
24 medical issues and with respect to exposure issues, to tighten
25 up all of those criteria so that the expedited review process

1 would be more constrained.

2 MR. LEWIS: Are you offering that now?

3 MR. FINCH: I'm offering Exhibit 141, which is the --

4 MR. LEWIS: Okay. I understood that question to be
5 foundational. I did not object to the extent it's substantive.
6 I do object and move that the answer be stricken. I also
7 object to the exhibit on the grounds of relevance.

8 THE COURT: All right. The exhibit would speak for
9 itself, but I see no relevance. The objection to relevance is
10 sustained.

11 MR. FINCH: And, finally, Your Honor, the plan
12 proponents would offer a Plan Proponent Exhibit 287 which is
13 the United States Gypsum trust distribution procedures that was
14 approved by this Court in 2006.

15 MR. LEWIS: Objection, relevance.

16 THE COURT: Sustained.

17 MR. FINCH: With that, Your Honor, the plan
18 proponents pass the witness.

19 THE COURT: All right. We'll take a ten-minute
20 recess.

21 MR. LEWIS: Thank you, Your Honor.

22 MR. FINCH: Thank you, Your Honor.

23 THE COURT: You're excused, Mr. Inselbuch.

24 THE WITNESS: Thank you.

25 THE COURT: I just want to make my -- finish my note.

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1 Thank you.

2 (Recess)

3 THE COURT: Please be seated. Mr. Inselbuch? Mr.
4 Lewis?

5 MR. LEWIS: Thank you, Your Honor.

6 CROSS EXAMINATION

7 BY MR. LEWIS:

8 Q Good morning, Mr. Inselbuch.

9 A Good morning, Mr. Lewis.

10 Q How long have you been lead counsel for the ACC in these
11 proceedings?

12 A From its beginning.

13 Q And you, I believe, testified that you were the person on
14 behalf of the ACC primarily responsible for the trust agreement
15 and the TDP, is that true?

16 A Certainly for the TDP.

17 Q But perhaps not to the trust agreement?

18 A Well, I don't know what you mean by responsible.

19 Q Okay. What I mean, you as lead counsel, were you
20 primarily responsible for the drafting of the trust agreement?

21 A I was responsible for the product. I didn't do the
22 drafting.

23 Q And with respect to the TDP, did you have more direct
24 involvement with drafting the TDP --

25 A Certainly in so far as it involved changes to accommodate

1 Libby's issues.

2 Q Very well. Thank you. Now, are the TDP disease values
3 based on tort system values?

4 A You're asking me about the expedited review category
5 values?

6 Q I'm talking about the TDP disease values. Are they based
7 on tort system value?

8 A If you're asking me about the values that are in the
9 expedited review criteria, they are based upon values that were
10 achieved in the tort system.

11 Q For example, then, if you had a Level 2 claim which
12 expedited review provides for \$2,500 per claim, correct?

13 A I'd have to look and see.

14 Q Well, assume that to be true.

15 A Sure.

16 Q Okay. Is that intended to approximate the average value
17 in the tort system for that kind of disease?

18 A It was intended to reflect something a little higher than
19 the average for diseases of -- in that -- of that order of
20 seriousness.

21 Q And that wasn't to entice or to -- maybe that's too strong
22 a word -- to encourage claimants to proceed with expedited
23 processing under the TDP and the plan, correct?

24 A Among other things, yes.

25 Q Okay. And so the \$2,500 for Level 2 is, indeed, above the

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1 average value for that kind of claim around the country as paid
2 by W.R. Grace, is that true?

3 A It's meant to be, yes.

4 Q Okay. Was the process of arriving at disease values based
5 on Dr. Peterson's proposed values in consultation with the ACC?

6 A Yes.

7 Q And were Dr. Peterson's values based on the Grace
8 historical settlement values and how those values might have
9 evolved absent a Chapter 11 filing by Grace?

10 A Yes.

11 Q So then did Dr. Peterson share his views with the
12 committee --

13 A Yes.

14 Q -- on what should be done in this particular case?

15 A Yes.

16 Q And that's based on Grace's historical settlement history,
17 true?

18 A Yes.

19 Q Did it also reflect Dr. Peterson's advice as to whether,
20 if at all, these claims would have evolved over the years had
21 there not been a filing by Grace?

22 A Yes.

23 Q Did this evolution include growing the value of the claims
24 to present worth, if you know?

25 A As I understood it from Dr. Peterson, he was trying to

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1 provide the committee with an estimate of what the settlement
2 values would have been as of the time he was doing the work had
3 there not been a Grace Chapter 11. But there had been other
4 Chapters 11 -- Chapters 11s -- taking other major defendants
5 out of the tort system and, thus, leading potentially to higher
6 amounts of liability for Grace if it had remained in the tort
7 system.

8 Q Does that explain why the average value for a mesothelioma
9 case -- well, let me first ask a foundational question. Do you
10 understand that the average value for a meso case against Grace
11 immediately prior to the filing was approximately \$90,000?

12 A I don't recall.

13 Q So you don't know?

14 A I don't recall.

15 Q You can't recall today?

16 A Correct.

17 Q But we do know that the value set for a mesothelioma under
18 the TDP and the plan is \$180,000, correct?

19 A That's what it says.

20 Q But you don't know that?

21 A I don't carry the numbers in my head, Mr. Lewis.

22 Q Okay. Fair enough. Do you know if the values for Libby
23 that were used to arrive at what you call the special treatment
24 or the extraordinary treatment for Libby claims were also grown
25 to present worth?

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1 A What you mean by grown is to take account for the fact
2 that had Grace not been in Chapter 11, others would have been?

3 Q Yeah.

4 A I don't believe they were.

5 Q So they were not grown or raised to account for, what,
6 inflation and settlements and verdicts?

7 A That would have resulted from other companies going into
8 Chapter 11 since that was irrelevant with regard to the Libby
9 claims.

10 Q Yes, but we do know that in the tort system the verdicts
11 have gone up with time, correct, if you know?

12 A As a general proposition, they've gone up with time.

13 Q All right. Now, when Mr. or Dr. Peterson -- is he
14 referred to Dr. Peterson or Mr. Peterson, sir?

15 A I call him Mark.

16 Q Okay. I'll call him Mr. Peterson --

17 A Fine.

18 Q -- if that's all right because I don't know him very well.
19 In arriving at these values that he provided for the ACC, did
20 Mr. Peterson have access to the Grace historical settlement
21 values?

22 A I understood that he did.

23 Q He had access to that database, correct?

24 A I understood that he did.

25 Q And he had access to the historical database as it related

1 to Libby, true?

2 A I understood that he did.

3 Q And he had access to Grace's database as it related to
4 non-Libby cases, true?

5 A I understood that he did.

6 Q Okay. And directly or indirectly through Mr. Peterson,
7 the ACC and presumably you had access to the historical
8 database for both Libby exposure cases and non-Libby exposure
9 cases, is that also true?

10 A I'm not sure.

11 Q So you don't know?

12 A I know that no member of the committee that I'm aware of
13 actually did access the historical database, but I'm not sure
14 whether or not they were empowered to.

15 Q So your testimony is that no member of the committee ever
16 accessed the historical -- the database or Grace's historical
17 settlement values, is that true?

18 A I believe that's true, other than the information they got
19 from Dr. Peterson.

20 Q You testified that Level 4B severe disabling pleural
21 disease was developed specifically in response to the Libby
22 claimants, is that correct?

23 A Yes, sir.

24 Q And do you know what Level 4B pays?

25 A I think \$50,000.

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1 Q That's what you testified on direct, correct?

2 A Well, if I had it in front of me.

3 Q Okay. And then the plan authorizes an 8X multiplier
4 extraordinary treatment if all criteria are met under the plan,
5 correct?

6 A It authorizes it whether or not the criteria are met.

7 Q Okay. So does that mean --

8 A I'm sure -- I don't know which criteria you're talking
9 about.

10 Q Well, let's take the TDP criteria first.

11 A For what?

12 Q If the TDP criteria are met and it is demonstrated that
13 the claimant has 95 percent or more Grace exposure --

14 A Yes.

15 Q -- then the claimant qualifies for an 8X multiplier,
16 correct?

17 A If the claimant also satisfies the trust that he has
18 little likelihood of collecting any money elsewhere.

19 Q Thank you. With that --

20 A And he qualifies for up to an 8X multiplier.

21 Q All right. Well, in your direct testimony, I thought you
22 said he qualifies for the 8X multiplier. You didn't say up to.
23 Is that a modification of your earlier testimony?

24 A I don't believe so.

25 MR. FINCH: Object to form.

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1 Q Okay. All right. I understand, you know. In any event,
2 just to be clear --

3 A In fact, I testified at length that you didn't like that.

4 Q I'm sorry. I didn't hear what you said to me.

5 A I think I testified at length that this was an objection
6 that Libby had that you wanted an automatic eight times
7 multiplier and the committee would not agree.

8 MR. LEWIS: I want to be polite to you, sir, but you
9 should let me ask the questions and I move to strike that
10 volunteer testimony, Your Honor.

11 THE COURT: Sustained.

12 Q Sir, that 8X multiplier applies not just to Libby, but to
13 everybody in the United States if they can meet the criteria
14 and show that they had at least 95 percent Grace exposure and
15 had no substantial likelihood of recovery elsewhere, correct?

16 A Yes, sir.

17 Q Okay. So it does -- even though it was developed for
18 Libby, it's applied across the board, correct?

19 A Yes, sir.

20 Q All right. Now, when you arrived at that 8X multiplier,
21 you had a method in doing that, correct?

22 A By you, you mean the committee?

23 Q You and the committee.

24 A There was a method, yes.

25 Q And the method was that eight times \$50,000 was \$400,000

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1 which fairly well approximated the average recovery in Libby or
2 represented Libby claimants exposed to Grace asbestos, correct?

3 A I don't remember it quite that way.

4 Q Is that what you testified to in your deposition, or do
5 you know?

6 A I don't know. I can't recite what I testified to in my
7 deposition.

8 Q Okay. In any event, the ACC recognized that the 400,000
9 historic settlement value only for -- with respect to severe
10 disabling pleural disease under Level 4B, correct?

11 A I don't understand the question.

12 Q All right. What historic value did the ACC use for
13 purposes of assigning value for impaired but not severe cases?

14 A You mean Level 3?

15 Q Yes.

16 A The unimpaired cases or the lower less impaired cases were
17 not specifically reviewed in this context. We were trying to
18 put a value on the severely disabled pleural disease and couple
19 that with a multiple which made available in the extreme cases
20 would come up to values which we were told the Libby claimants
21 were achieving against Grace before the bankruptcy.

22 Q So let me understand that correctly. So you applied the
23 8X multiplier and the other criteria to achieve approximation
24 of what this historical Libby recovery was for just the
25 impaired and severely disabled claims, is that true?

1 A That's not what I said.

2 Q Well, is it true?

3 A I'm not sure.

4 Q Okay. Did you say that you did not use the historical
5 values for Libby's settlements in reaching the recovery that
6 would be used for impaired but not disabled claimants under
7 Level 3?

8 A That's correct.

9 Q And may I assume that you did not use Libby historical
10 values for Level 2 either?

11 A That's correct.

12 Q Okay. Did you use Libby historical values with respect to
13 the mesothelioma claims, if you know?

14 A We looked at that and didn't believe that any change
15 needed to be made.

16 Q Do you know that there are a number of cases in Libby
17 where impaired but not disabled claimants under the TDP
18 achieved settlements in excess of 400,000?

19 A Yes, there are cases like that all over the country.

20 Q Did you know that in Libby all of the cases resulted in
21 some recovery?

22 A I don't know that one way or the other.

23 Q Did you know in Libby that none of the cases were
24 dismissed prior to trial or settlement?

25 A I don't know that one way or the other.

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1 Q I'm going to jump around here just a little bit. Near the
2 end of your testimony, you talked about wrongful death and loss
3 of consortium, do you recall that?

4 A Yes.

5 Q And you said that under this plan wrongful death or
6 consortium claims are treated as one claim, one recovery, is
7 that true?

8 A One injury, yes.

9 Q One injury, fair enough. And, therefore, one recovery?

10 A Yes, sir.

11 Q Okay. Did the ACC look at average values, average
12 historical values for Grace claims in Libby in arriving at its
13 conclusion that wrongful death claims or consortium claims
14 would be treated as one claim under the plan?

15 A I'm not sure I understand the question, but I think the
16 answer is no because it would have not been relevant to our
17 thinking.

18 Q Do you remember that -- at English common law there was no
19 such thing as a wrongful death claim?

20 A Do I remember that? I'm not that old.

21 Q Well, do you understand that all wrongful death claims are
22 creatures of statute?

23 A I believe I learned that in law school.

24 Q All right. And that started with Lord Campbell's Act, do
25 you recall that now?

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1 A No.

2 Q Okay. Well, let me talk to you about that a little bit.
3 So you treat under the plan all claimants equal with respect to
4 wrongful death claims, correct?

5 A We try to, yes.

6 Q Do you know if there are states where wrong -- damages for
7 wrongful death are not recoverable?

8 A Yes.

9 Q Do you know how wrongful death and survivorship claims are
10 handled in Montana?

11 A I don't recall. It was explained to me some months ago,
12 but I don't recall specifically.

13 Q Do you understand that in -- when someone dies of
14 asbestosis in Montana that there can be both a survival and a
15 wrongful death claim?

16 A Yes, and it's true in other jurisdictions, also.

17 Q So there was no attempt --

18 THE COURT: Wait. Excuse me, just a minute. Just
19 tell him to do what she asks. Thank you. I'm sorry. Go
20 ahead.

21 MR. LEWIS: Thank you, Your Honor.

22 Q So was this an example of the rough justice that you were
23 attempting to achieve by the TDP and the plan?

24 A No. It was a codification of what we understand goes on
25 in the tort system throughout the country that when defendants

1 settle cases where there's a death involved, they like to pay
2 one amount of money and they like to resolve the claim with
3 everybody that might have a piece of the statutory rights. And
4 that's what the trust is trying to do.

5 Q Is settlement of wrongful death claims mentioned in the
6 plan?

7 A I think if you look at the definition of personal injury
8 or whatever that word of art is it will include claims for
9 death and survivorship and whatever else in the plan glossary.

10 Q Is there anything --

11 A I think they're called PI trust claims, sorry.

12 Q I'm sorry. I didn't mean to interrupt you.

13 A No, I'm sorry.

14 Q Is there any place in the plan that prescribes who has to
15 sign a release or if a release has to be signed to get any
16 recovery under the plan?

17 A I think the TDP and the trust agreement somewhere provide
18 for the requirement that proper releases be obtained and the
19 trustees will determine what that means.

20 Q But that would be up to the trustee?

21 A And it will vary from state to state.

22 Q Okay. But even though the releases might vary, the amount
23 recoverable for wrongful death would be the same, correct?

24 A No. It depends what disease. It would depend upon
25 whether the case went through individual review or not. It

1 would depend upon whether it was an extraordinary claim. The
2 amounts could be very different.

3 Q But the claim would be resolved as one injury?

4 A That would be the intention.

5 Q So even if under Montana law a plaintiff's survived for an
6 appreciable period of time, say many years before he died, and
7 then his beneficiaries brought a wrongful death claim, there
8 couldn't be two recoveries under that situation with respect to
9 the TDP, correct?

10 A That's correct. But all of those factors should be
11 considered in the amount that's considered in individual
12 review.

13 Q Okay. Let's talk about individual review for a minute.
14 You said that individual review could be done in more than one
15 way, correct?

16 A No, the process is always the same.

17 Q What is the process? Just refresh my recollection on
18 that.

19 A All right. Claimant asks to be -- have the claim
20 considered in -- well, one way is if the claim is rejected
21 under expedited review and the claimant believes it was
22 wrongfully rejected. The claimant can take up through the ADR
23 process the question of whether that rejection was correct.
24 Holding that aside, a claimant can elect individual review
25 either to deal with that question or to deal with valuation

1 questions. And when the claimant does that, the trust will
2 have developed some process for considering what the trust
3 might or might not offer by way of compensation.

4 Q What plan -- what process is identified in the plan?

5 A The plan provides the criteria and the factors that the
6 trust is required to implement, who the people are that the
7 trust decides to hire, whether they would be out -- an outside
8 office or whether they would be internal personnel or whether
9 they would be some other functionary who would do it in the
10 first instance, that's left for the trustees to decide. They
11 also can decide what piece of paper the claimant might have to
12 file to elect individual review. Things like that are left to
13 the discretion of a trustee.

14 Q Let me be more specific, sir. Does the plan provide for
15 arbitration in some circumstances?

16 A Yes.

17 Q Okay. Does it provide for binding arbitration?

18 A It does.

19 Q Does it provide for mediation?

20 A Yes.

21 Q Who picks those people that do the mediation and the
22 arbitration?

23 A The mediators and the arbitrators are selected by the
24 trustees with the concurrence of the TAC members and the
25 futures rep.

1 Q Does the ACC have any say in who picks those people?

2 A No.

3 Q How about with respect to the extraordinary claims, who
4 picks the extraordinary claims panel?

5 A The trustees would --

6 MR. BERNICK: Your Honor, I'm going to object. I
7 don't think this goes to the question of equal treatment.
8 There's -- this issue comes up later on in the course of the
9 trial. It doesn't go to equal treatment. It's not Libby
10 specific.

11 MR. LEWIS: Well, I don't think he can object.

12 THE COURT: Why is the --

13 MR. LEWIS: I mean, he's not handling this witness.
14 I don't understand this.

15 MR. BERNICK: I represent W.R. Grace. I don't
16 represent, Your Honor, the ACC.

17 THE COURT: He clearly has standing on behalf of the
18 debtor to object. But, regardless, well, how does this affect
19 the Libby specific issues.

20 MR. LEWIS: Well, it's cross examination of matters
21 covered in direct examination.

22 THE COURT: It is. And the issues will come up at a
23 later time. We've narrowed this trial so that the Libby
24 specific issues are what are to be tried first. That was my
25 understanding of the case procedure.

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1 MR. LEWIS: Well, I think with a couple more
2 questions we may or may not establish as it relates to Libby.
3 I don't know what his answer is going to be, Your Honor.

4 THE COURT: Well, okay. You've got a little leeway,
5 but move it to something that's relevant.

6 MR. LEWIS: Yeah, I will move it along.

7 THE WITNESS: Could I have the question back?

8 Q Yeah. Who picks -- we have an -- we can have
9 extraordinary claims under the plan, correct?

10 A Yes.

11 Q Okay. And how does the extraordinary claims process work?

12 A Well, a claimant -- presumably pieces of paper will be
13 generated by the trust that will govern what claimants have to
14 do to say I want to be treated as an extraordinary claim. When
15 they do that, the trust will respond. If the trust agrees with
16 the claimant, that will be -- then they would proceed as an
17 extraordinary claim. If they do not agree with the claimant,
18 then there is access to what's called the extraordinary claims
19 panel which will ultimately decide the question.

20 Q And who sits on that panel? Who decides who sits on that
21 panel?

22 A The trustees with the consent of the TAC members and the
23 futures representative.

24 Q All right. Is there -- can a claimant who's denied
25 extraordinary claims treatment after he has a hearing or

1 consideration by the panel, and after the panel makes decision,
2 is it an exit to have a jury trial?

3 A No.

4 Q Why not?

5 A The plan does not so provide.

6 Q The only way that a claimant can get a jury trial is to
7 first go through the mediation non-binding arbitration process
8 and if he's not happy ask for a jury trial, is that correct?

9 A That does not have to do with extraordinary claims, but
10 that's correct.

11 Q I understand that. What I'm saying is if a person wants
12 to access the extraordinary claims process does he effectively
13 waive his right to a jury trial under the plan?

14 A No. No, there is no right to a jury trial on a question
15 of extraordinary claims, but on all the issues of valuation
16 they're not trumped by seeking extraordinary claims treatment.

17 Q Okay. The point I'm making though is if a claimant
18 decides to seek extraordinary claims treatment which would
19 include the eight times multiplier, is that correct?

20 A It could.

21 Q Okay. If he's dissatisfied he's stuck with what the
22 extraordinary claims panel says, right?

23 A On the question of whether it's an extraordinary claim,
24 that's correct.

25 Q Now, what about the jury trial? What kind -- if a

1 claimant goes through the process and qualifies for a jury
2 trial, does he get a jury trial as to the tort value of his or
3 her case?

4 MR. BERNICK: Your Honor, again, this is all -- not a
5 word is Libby specific or goes to discrimination or unequal
6 treatment. Everybody gets the same process.

7 THE COURT: So far that's what the witness has been
8 saying. If you want to show some difference I think we could
9 get to those questions.

10 MR. LEWIS: I do have another question that will
11 establish.

12 Q Did the ACC assume that virtually all of the Libby claims
13 would go through the extraordinary claims process?

14 A We didn't know, because Libby has been asserting for a
15 long -- the Libby claimants have been asserting for a long time
16 that they have entitlements to recovery -- to substantial
17 recoveries elsewhere. So we didn't know exactly what they
18 would be doing, or what they would be claiming, and we don't
19 know today what they might or might not be claiming at the
20 trust.

21 Q Well, let me ask it this way, did the ACC anticipate that
22 Libby claimants almost all have to seek extraordinary review to
23 obtain a just result?

24 A No.

25 Q Was the 8X multiplier -- well, let me withdraw the

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1 question. The 8X multiplier which is part of the extraordinary
2 claims process was in fact developed in response to the Libby
3 claims. You testified to that, true?

4 A The claims that were being made on behalf of the Libby
5 claimants. Yes.

6 Q Let's talk about punitive damages. You testified on
7 direct that punitive damages could not be considered or would
8 not be considered in this plan, is that correct?

9 A That's correct.

10 Q Is there anything in the Bankruptcy Code that prevented
11 the plan proponents from including something for claimants who
12 could show punitive conduct on the part of Grace?

13 MR. FINCH: Objection. Calls for a legal conclusion.

14 THE COURT: Doesn't it call for a legal conclusion?

15 MR. LEWIS: No. I asked if there's anything in the
16 plan, Your Honor, that provides --

17 THE COURT: No, you asked him the Bankruptcy Code.

18 MR. FINCH: He asked him the Bankruptcy Code.

19 MR. LEWIS: Well, I'll just -- I'll rephrase the
20 question.

21 A I don't know. It's all right.

22 Q You don't know?

23 A I don't know.

24 Q All right.

25 A I don't purport to be an expert on the Bankruptcy Code.

Inselbuch - Cross/Lewis

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1 THE COURT: Okay.

2 Q So you don't know whether there's any law that would
3 require inclusion of punitive damages in -- let me finish -- in
4 a plan --

5 MR. FINCH: Objection.

6 Q -- or exclude punitive damages in a plan?

7 MR. FINCH: Objection. Calls for legal conclusion.

8 MR. BERNICK: It also doesn't go to discrimination.

9 Same rule applies to all jurisdictions.

10 THE COURT: Both sustained.

11 Q Have you ever been to Libby?

12 A No, sir.

13 Q Ever reviewed any Libby specific claims?

14 A I don't believe I reviewed any specific claims, Libby or
15 otherwise.

16 Q Now you said the medical criteria came from the PI
17 Committee upon consultation with medical advisors, is that
18 correct?

19 A Well, apart from the Libby pieces those criteria had
20 existed for a long time and were brought forward here. The
21 Libby pieces --

22 Q Okay, so you --

23 A -- yes.

24 Q Okay. So as to the non-Libby claimants you didn't consult
25 any medical experts to decide what the medical criteria would

1 be for them, correct?

2 A Not in connection with the Grace TDP.

3 Q But only as to Libby did you consult to medical.

4 A Because we were going to make a modification.

5 Q Fair enough. Now, you indicated as to caps, that the
6 first reason for caps was you were trying to establish Grace's
7 several share. Do you recall that testimony?

8 A We were trying to establish Grace's several share, but
9 that wasn't the reason for the cap.

10 Q But in response to that you said you were trying to --
11 when you were asked about the caps that's one of the things you
12 testified to, do you recall that?

13 A Not that way.

14 Q Well, in any event, were you trying to establish Grace's
15 several share for some purpose?

16 A Yes. For the dollar values for the categories in the
17 plan.

18 Q All right. Now in evaluating Grace's several share does
19 that depend greatly on state law?

20 A Not in our view. We took the historical settlements, the
21 hundreds of thousands of resolved cases throughout the country,
22 and we did not, as I recall, investigate the vagaries of the
23 different state laws.

24 Q Okay, but -- so then by several share you didn't mean
25 joint and several liability. You meant what Grace's share

1 would be of a recovery when there were multiple defendants or
2 no defendants, is that what you're talking about?

3 A No. Something north of 95 percent of cases -- asbestos
4 cases in the tort system settled. Very, very few actually go
5 to verdict. The history of those settlements was what we took
6 to -- what we understood to be Grace's view of what its several
7 share of the liability was.

8 Q Okay. So if Grace paid \$20,000 in a Monokote claim --

9 A Yes.

10 Q -- that your -- as to that particular claim that would be
11 Grace's view as to their several share in that claim, is that
12 what you're saying?

13 A Yes, in a general sense.

14 Q And if Grace paid 500,000 for a Libby exposure at the mine
15 or mill that would be Grace's view as to its several share in
16 that case.

17 A No. Because the concept of a several share as we
18 understood it did not apply in Libby.

19 Q And why not?

20 A Because as we understood it, the Libby claimants did not
21 have claims against other asbestos manufacturers.

22 Q For the most part -- well, let me rephrase that. I think
23 we're agreeing here. So as to a Monokote claim or some other
24 products claim there might be 20 or 30 or 40 defendants,
25 correct?

1 A There might be.

2 Q And in that case if all defendants contributed, Grace's
3 several share would be reduced substantially, correct?

4 A Several share would be what it is.

5 Q But in Grace cases in Libby where the exposure was almost
6 all Grace asbestos --

7 A Yes.

8 Q -- then generally in many cases there were no other
9 defendants, correct?

10 A Apart from the argument that the Libby folks have been
11 making that they have these claims against other entities,
12 that's correct.

13 Q All right.

14 A As far as we knew there were no other asbestos products to
15 which the Libby claimants were exposed.

16 Q Right. So if the claim against the railroad was an
17 asbestos claim was based on exposure to --

18 A Grace product.

19 Q -- Grace product.

20 A Yes, sir. That's our understanding.

21 Q And same with the state of Montana, right?

22 A That's our understanding.

23 Q All right. So the Grace share would be the dominant --
24 they'd be the dominant reliable party, do you agree with that
25 in that situation?

1 A No.

2 Q Okay.

3 A As I understood these claims they were independent tort
4 claims to which Grace might not even be a joint tort feisor.

5 Q All right. But the Grace settlement value that they paid
6 that's the best indicator of what their share of liability is.

7 We can agree with that, correct?

8 A I guess so. I'm not sure I understand. I'm not sure
9 we're saying different things.

10 Q Okay. Well, did Dr. Peterson's numbers come -- were those
11 based upon Grace data as to the historical value of
12 settlements?

13 A That was our understanding.

14 Q All right.

15 MR. LEWIS: I'll try to speed it up, Your Honor.
16 Just let me review my notes. I'm about done.

17 THE COURT: Sure.

18 (Pause)

19 Q One last line of questions. Do you know what the average
20 settlement value according to Grace records was for settlements
21 in Libby, or arising from Libby exposure would be a more
22 correct way to ask the question.

23 A Not as I sit here today.

24 Q And do you know --

25 A I was exposed to all those numbers at one point.

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1 Q Okay. Fair enough. And you don't know what the average
2 settlement of value -- amount was for non-Libby exposure cases
3 according to Grace's data, is that true?

4 A As I sit here today, no. I don't -- I can't recite on
5 those numbers.

6 Q Okay. So if I have this correct, just summarizing your
7 testimony as to your role with respect to the TDP -- don't take
8 this as an offense, but were you the big picture guy here?

9 A Whatever its warts, I'm responsible for it.

10 Q Fair enough. But the devil's always in the details in
11 these kinds of things, correct?

12 A There are devils in the details and there are devils
13 elsewhere.

14 Q In any event you weren't the guy that provided the
15 details. The details were provided -- the number details were
16 provided by Mr. Peterson, true?

17 A He made recommendations to the committee members with
18 respect to the numbers. The committee members themselves were
19 very experienced in this area, and had -- each of them had
20 their own views about numbers as well. What you see in the TDP
21 is what the committee ultimately, after consulting with the
22 futures representative, agreed those numbers should be.

23 Q But you personally were not involved in those numbers,
24 correct?

25 A I was, as you say, the big picture fellow. I was --

Inselbuch - Redirect/Finch

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1 Q There you go.

2 A I was running the conversation.

3 Q All right. Thanks a lot.

4 MR. LEWIS: Pass the witness, Your Honor.

5 MR. FINCH: Redirect, Your Honor?

6 THE COURT: All right. Mr. Finch.

7 REDIRECT EXAMINATION

8 BY MR. FINCH:

9 Q Can you describe how the several share concept relates to
10 the multiplier in the extraordinary claims provision?

11 A Yeah. The expedited review provisions are based on the
12 assumption that in the overwhelming number of cases the
13 claimant will have claims not only against Grace, but against a
14 multiplicity of other defendants, because of the nature of the
15 work usually done. But in some small minority of cases that is
16 not the fact. And in those situations where the liability that
17 the particular claimant could assert is primarily against
18 Grace, it would be unfair to limit the recovery that that
19 person would have in the same way we limit the recovery for
20 someone who has a multiplicity of other sources of recovery.
21 That is what the extraordinary claims provision is designed to
22 fix in a kind of rough justice way. Multiply the available
23 maximum recovery so that you can accommodate the fact that the
24 particular claimant has little likelihood of recovery
25 elsewhere.

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1 Q In response to one of Mr. Lewis' questions you said that
2 the extraordinary claims panel's decision was final as to
3 whether or not the claim was extraordinary. Do you recall that
4 testimony?

5 A Yes, sir.

6 Q What do you mean by whether or not the claim is
7 extraordinary?

8 A The only question that goes to the extraordinary claims
9 panel is whether or not the claim satisfies the requirements
10 for extraordinary claims treatment.

11 Q You mean the 95 percent or 75 percent, is that what you
12 mean by that?

13 A Yes, sir.

14 Q And what about the question of what disease the claimant
15 has? Is that decided by the extraordinary claims panel?

16 A No.

17 Q And that's something that can be decided by either an
18 arbitrator or the juror.

19 A Yes.

20 MR. LEWIS: Objection, leading, Your Honor.

21 Q How is that question decided?

22 A Other than whether or not the claimant's claim is
23 extraordinary or not all other issues in individual review can
24 go up the ADR channel and ultimately exit to the tort system if
25 the claimant wishes to.

1 Q You were asked some questions about the wrongful death and
2 consortium claims. Why wasn't the TDP changed at the request
3 of the Libby claimants to have separate categories and separate
4 values for wrongful death and consortium only claims?

5 A Apart from it being seen as unnecessary it would create a
6 multiplicity of differing calculations depending upon what the
7 operative state law would be. And in our judgment if you
8 permitted for a multiplicity of claims by various people around
9 the same tort or the same damage, you would -- you could -- the
10 process costs would be imponderable. We do, under this
11 document, what defendants do in the tort system. They seek to
12 resolve the claim for the injury and put to rest whatever the
13 various pieces of that claim might be at the same time;
14 whether it's wrongful death, whether it's a survivorship claim,
15 whether it's a loss of consortium claim, and whether it's the
16 underlying claim itself. There's a package of injury there
17 that the TDP designs to pay once and provides the trust with
18 the right to seek releases from whomever it might think might
19 have such a claim.

20 Q Why wasn't the little likelihood of substantial recovery
21 elsewhere provision eliminated at the request of the Libby
22 claimants?

23 A It's at the heart of the extraordinary claims provision.
24 The idea of the extraordinary claims provision is that the
25 claimant can't recover somewhere else. If they can recover

1 somewhere else --

2 MR. LEWIS: Your Honor, that's beyond the scope of my
3 cross. I did not touch that subject.

4 THE COURT: And it's been asked and answered, Mr.
5 Finch. Let's get to something new if you have something new.

6 Q You testified that about how the \$50,000 average value for
7 severe disabling pleural disease related to the 8X multiplier
8 in Libby claimants' history. Do you recall that testimony?

9 A Yes.

10 Q Why didn't the committee do a similar analysis for the
11 unimpaired non-malignants from Libby?

12 A The committee was generally unsympathetic to the idea that
13 there would be the ability to collect substantially larger sums
14 above what the national averages were for what were regarded as
15 relatively minor injuries. The committee was most concerned
16 with providing appropriate compensation for people who are
17 seriously damaged by exposure to Grace asbestos.

18 Q Did the fact that there was comeback rights as between the
19 non-malignant disease categories play a role in that
20 consideration?

21 A Sure. If they ultimately got sick -- got sicker they
22 could come back again and collect again.

23 Q When it came to dealing with the Libby claimants and their
24 concerns that they expressed to the TDP, who was the person
25 that primarily was most involved in dealing with those concerns

1 from counsel to committee?

2 A From counsel to committee myself and to some degree
3 yourself.

4 Q And when it came to the details of what they were
5 complaining about did you have extensive communications and
6 correspondence with counsel for Libby claimants?

7 MR. LEWIS: Objection, leading, Your Honor.

8 THE COURT: Sustained.

9 Q Could you describe the process that you dealt with the
10 counsel for the Libby claimants?

11 A Well, first of all, the committee appointed a subcommittee
12 or actually designated its negotiating subcommittee to address
13 these issues with counsel and with the Libby constituency. In
14 the course of that, I, as counsel, engaged in a number of
15 conversations with counsel for the Libby claimants. We
16 exchanged a great deal of correspondence on the subject, and I
17 would report back. Sometimes the members of the committee
18 would be present in those discussions, sometimes not.

19 MR. FINCH: Your Honor, I don't have anything
20 further.

21 THE COURT: Mr. Lewis, any recross?

22 MR. LEWIS: No, Your Honor, no more questions.

23 THE COURT: You're excused, Mr. Inselbuch. Thank
24 you.

25 MR. INSELBUCH: Thank you, Your Honor.

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1 THE COURT: Mr. Finch.

2 MR. FINCH: Your Honor, the next plan proponents'
3 witness would be Dr. Laura Welch. I don't know what Your
4 Honor's plans are for the lunch break, but before we put on Dr.
5 Welch could I have a five minute break?

6 THE COURT: Well, maybe this is a time to recess for
7 lunch. How long do you folks need? We are going to stop trial
8 everyday at six except, I think you got the word, the final
9 Thursday. I have to stop at noon. I had an emergency.

10 MR. FINCH: Is there also a stoppage at four on
11 Thursday or is that --

12 THE COURT: This Thursday. Yes.

13 MR. FINCH: This Thursday it'll stop at four. I
14 think Dr. Welch's direct will take an hour, an hour and 15
15 minutes max.

16 THE COURT: So you folks tell me.

17 MR. FINCH: Is the question how long do we want for
18 lunch?

19 THE COURT: Yes.

20 MR. BERNICK: I think during the estimation trial it
21 ended up being kind of, if you say 45 minutes we get started in
22 an hour.

23 THE COURT: It's hard to get up and down the
24 elevators.

25 MR. BERNICK: Yes. But I think that the more that we

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1 adhere to the schedule which -- and I commend counsel for the
2 Libby claimants for either being deliberately succinct or in
3 any event being naturally succinct, but we're on schedule and I
4 think that if we keep it 45 minutes and therefore make sure
5 that we're back in an hour we're going to move through this.

6 THE COURT: All right. Then you want to do -- we'll
7 take a lunch recess now then so that you can start your witness
8 and then we'll continue with her through the afternoon. So
9 we'll be in recess until one o'clock. We will start at one
10 o'clock on time.

11 MR. FINCH: Thank you, Your Honor.

12 THE COURT: All right.

13 (Recess)

14 THE COURT: Please be seated. Mr. Finch.

15 MR. FINCH: Nathan Finch for the asbestos claimants
16 committee. Your Honor, the plan proponents' next witness is
17 Dr. Laurie Welch. And as with the other witness we have a set
18 of exhibits and we also have a demonstrative -- set of
19 demonstrative exhibits. May I approach the bench and hand Your
20 Honor her copy?

21 THE COURT: Yes. Thank you. I think Dr. Welch needs
22 to be sworn in.

23

24 L A U R A W E L C H, WITNESS, SWORN

25 DIRECT EXAMINATION

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1 BY MR. FINCH:

2 Q Could you state your name for the record, Dr. Welch.

3 A Laura Stewart Welch.

4 Q Did you prepare some slides for your testimony today?

5 A Yes, I did.

6 Q Did you review them all?

7 A I did.

8 Q Do these slides accurately describe your qualifications
9 and the opinions and subject matters of your testimony?

10 A Yes, I think they do.

11 Q Do you believe that they will help the Court to understand
12 the testimony you're about to give?

13 MR. FINCH: Your Honor, these slides are in the slide
14 show book. They have been marked plan proponents Exhibit 174.
15 If I could have the slides up on the screen. A copy of them
16 has been provided to counsel for the Libby claimants this
17 morning.

18 Q Dr. Welch, could you describe your educational background,
19 please?

20 A Yes. I graduated with a Bachelors in biology from
21 Swarthmore College in 1974, and I graduated from the State
22 University of New York at Stony Brook Medical School in 1978.
23 I then did a residency program in internal medicine at
24 Montefiore Hospital which is in the Bronx. It's part of the
25 Albert Einstein School of Medicine.

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1 Q Are you licensed to practice medicine?

2 A Yes. In the state of Maryland.

3 Q What are your areas of specialty?

4 A I'm board certified both in occupational environmental
5 medicine and in internal medicine.

6 MR. FINCH: Can I have the next slide, please.

7 Q What is internal medicine?

8 A It's medicine for adults. It's really general practice,
9 but restricted to adults. No kids and no ObGyn.

10 Q And what is occupational medicine?

11 A It's a specialty that focuses on the relationship between
12 individual and work or their environment. So it can range from
13 setting up medical programs for groups of workers to prevent
14 illness to treating individuals with work related conditions.
15 It's very broad, but it's really that intersection between work
16 and disease.

17 Q Could you tell the Court what formal training -- advanced
18 training you've had in epidemiology?

19 A Yes. As part of my residency in internal medicine I took
20 about three-quarters of a Masters in public health at the
21 Columbia School of Public Health. We had a joint relationship
22 with Columbia School Public Health. So I took advanced
23 training in epidemiology and statistics and in public health.

24 Q Have you held any faculty positions at a medical school?

25 A Yes. I was on the faculty at Yale University School of

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1 Medicine in the 1980s. Actually I was at Einstein for a year
2 prior to going to Yale. And then in 1985 moved to Washington
3 and took a full-time position at the George Washington
4 University School of Medicine. I'm currently adjunct there,
5 but I've been on the faculty there since 1985.

6 Q Were you a chair of any departments while you were at
7 George Washington?

8 A Yeah. I was chair of the Department of Environmental and
9 Occupational Health.

10 MR. FINCH: Next slide, please.

11 Q Could you describe other professional positions you've
12 held since 1985?

13 A Yes. As I mentioned I was full-time at GW, at George
14 Washington, and that was for about 12 years. And then I kept a
15 faculty appointment there, but I went to work for the
16 Washington Hospital Center which is the largest hospital in
17 Washington, D.C. And I ran the occupational environmental
18 programs for the hospital which included workers compensation,
19 employee health, short and long-term disability, as well as a
20 practice seeing people with work related conditions. Then in
21 2003 I took my current job, I'm medical director for an
22 organization called The Center for Construction Research and
23 Training that focuses on improving health and safety in the
24 construction industry in the U.S.

25 Q Is that the CPWR entity that's up there?

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1 A Correct.

2 Q Could you describe why you decided to leave George
3 Washington and take a position at the CPWR?

4 A Well, both at GW and at the hospital center my work kept
5 expanding to fill the time I didn't have and I had two
6 teenagers. So although CPWR is a great job it was a way for me
7 to kind of step back from being so busy and widespread and be
8 able to get my kids through highschool.

9 MR. FINCH: Next slide, please.

10 Q Have you been a consultant to any agencies of the United
11 States Government on medical issues or epidemiological issues?

12 A On the slides we have consultant to NIH. I've also been a
13 consultant to EPA, OSHA and NIOSH which are the three agencies
14 that deal with health and safety.

15 Q On what types of issues?

16 A EPA, it was regarding Love Canal. On OSHA it was help to
17 set up medical standards particularly for ergonomics, but also
18 from other chemical exposures. And for NIOSH for just multiple
19 things, peer review, grants review, documents review, a range
20 of different consultations.

21 Q Have you served as a peer reviewer for -- in the medical
22 journals?

23 A Yes.

24 Q Could you describe what those are?

25 A Yeah. I'm currently a peer reviewer for American journal

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1 Industrial Medicine, the Scandinavian Journal Work
2 Environmental Health, and the Journal of Occupational
3 Environmental Medicine. I probably do three or four papers for
4 each of those journals every year. And then occasionally for
5 environmental research and environmental health perspectives,
6 The Journal The American Medical Women's Association, a range
7 of others that send me an occasional paper.

8 Q Over the course of your medical career did you have
9 occasion to see and treat patients with asbestos related
10 diseases on a regular basis?

11 A Yes.

12 Q Where and when?

13 A Well, starting actually from just when I finished my
14 residency at Albert Einstein in New York we set up an
15 occupational medicine clinic at Montefiore. And then through
16 my whole career at Yale, at GW and at the Washington Hospital
17 Center. When I went to work for CPWR I stopped having a
18 clinical practice. So for about 20 years I had a regular
19 practice and a good proportion of the patients I saw had
20 asbestos exposure and asbestos related diseases.

21 MR. FINCH: Next slide, please.

22 Q Over the course of your career approximately how many
23 people have you diagnosed and treated with asbestos related
24 illnesses?

25 A Well, as a ballpark I'd say around a thousand. It could

1 be more than that.

2 Q And what diseases did these individuals suffer from?

3 A Well, generally the majority was non-malignant asbestos
4 related disease like asbestosis or pleural thickening from
5 asbestos, some lung cancers, one or two people with
6 mesothelioma where I was the diagnosing physician.

7 Q In the course of your medical career have you had the
8 occasion to review x-rays on a regular basis for purposes of
9 diagnoses and treatment of people with asbestos related
10 disease?

11 A Yes, I have.

12 Q Do you review pulmonary function tests on a regular basis
13 as part of your medical practice?

14 A Yes, I do.

15 Q Are you a B-reader?

16 A No, I'm not.

17 Q In addition to seeing patients for purposes of diagnosis
18 and treatment have you also had occasion to review the files of
19 people who have been deceased as a result of asbestos related
20 diseases for the purposes of giving opinions about what caused
21 their demise?

22 A Yes, I have, on a pretty regular basis.

23 Q You've served as an expert witness or expert consultant in
24 asbestos personal injury cases?

25 A Yes, I have.

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1 Q Have you ever designed an epidemiological study to study
2 disease in asbestos exposed populations?

3 A Yes, I have.

4 MR. FINCH: Next slide, please.

5 Q Could you describe the various studies that you have
6 designed and been the principal investigator for?

7 A The two large population-based surveys that I've been
8 involved with, one, the longer one is for sheet-metal workers.
9 Sheet-metal workers are a construction craft that install duct
10 systems. And they had exposure to asbestos due to other crafts
11 using asbestos around them. The International Union had hired
12 Dr. Selikoff in the early '80s to do a pilot study for them to
13 figure out whether sheet-metal workers had asbestos related
14 disease and he found a significant prevalence of disease so
15 they -- the union contracted with me to set up a national
16 program for them, which we started -- the first examinations
17 were in 1988 and it's still ongoing. We've had -- we've
18 examined just a little over 20,000 people with a number of
19 people having come back for recurrent exams, repeat exams.

20 Q And from time to time have you published the findings of
21 this study in peer review medical literature?

22 A Yes.

23 Q Have you published articles about asbestos related
24 epidemiology in peer review medical journals?

25 A Yes.

1 Q Can you give us examples of the type of topics that you
2 have published articles about relating to asbestos related
3 epidemiology?

4 A I think I published four papers about the sheet-metal
5 survey, initial prevalence of disease and then more recently
6 looking at changes over time, how people examined at different
7 periods of time have different prevalence of disease. We just
8 published an analysis of causes of death among the people who
9 participated in our screening program. And then in addition I
10 didn't mention the other large program is a similar program for
11 construction workers who worked for the Department of Energy on
12 building nuclear facilities. We have a similar program around
13 the country that's examined about -- I think about 12,000
14 people. And along with Dr. Dement who's at Duke we published
15 similar papers looking at asbestos related findings, abnormal
16 pulmonary function, and then some other issues like beryllium
17 and noise out of that population based study as well.

18 Q Do you use epidemiology on a regular basis in your career
19 in occupational medicine?

20 A Yes.

21 Q How long have you been doing and using epidemiology as a
22 regular part of your work?

23 A Really probably since 1981, 1982.

24 Q In addition to writing articles and serving as the lead
25 investigator on the sheet-metal worker study and the other

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1 study you mentioned what other things do you do to keep
2 yourself current on asbestos related epidemiology or asbestos
3 related medical issues?

4 A Well, I read -- subscribe to and read maybe ten
5 occupational medicine journals every month, and I have a
6 regular computer search that identifies articles of interest in
7 the literature including anything related to asbestos. And
8 then in addition in -- for preparing any of these publications
9 I'll go back and review all of the relevant literature, because
10 sometimes you -- asking a specific question I might look at a
11 particular study in a different light or it may be helpful in
12 terms of something I'm trying to explain in a paper. So I'm
13 regularly looking at what's new coming out and then also going
14 back and looking at things that I've looked at before, but
15 reading them again.

16 Q Do you also serve as a -- you also serve as a consulting
17 or testifying expert on asbestos medical cases?

18 A Yes, I do.

19 Q Does that help keep you current on what the state of the
20 literature is?

21 A Yes, that's true.

22 Q Approximately what percentage of your time do you spend
23 either as a consulting or a testifying expert in asbestos
24 personal injury litigation?

25 A Oh, I probably do one or two cases a year. It's not a big

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1 proportion of my time.

2 Q Have you received any grants from the United States
3 Government to study asbestos related illnesses?

4 A Yes.

5 Q And what was that?

6 A Well, there were two grants. One of which was to look at
7 -- it's kind of a narrow issue within occupational epidemiology
8 to look at the ability of workers to report exposures and their
9 distribution among different tasks which included asbestos.
10 But the larger one was to look at causes of death among the
11 sheet-metal workers. It was a grant from NIOSH that we had in
12 the 1990s.

13 Q Did there ever come a time when you were asked to consult
14 with the United States Senate Judiciary Committee and its
15 staffers on asbestos medical and asbestos epidemiological
16 issues?

17 A Yes. At the end of --

18 MR. FINCH: Next slide.

19 A -- 2002, and then continuing on through, I think 2005 I
20 worked with the judiciary committee on -- I guess the name
21 people know the most is the FAIR Act. It was an idea to set up
22 a national trust or a national compensation system for asbestos
23 related disease.

24 Q Did you give advice to the Senate of Judiciary Committee
25 and their staffers on the epidemiology of asbestos related

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1 disease as part of that work?

2 A Yes, I did.

3 Q Did you give advice on the medical criteria that were in
4 the proposed trust fund bill?

5 A Yes, I did.

6 Q Did you give advice on the risk of disease and the
7 likelihood of death from asbestos disease as part of that work?

8 A Yes, I did.

9 Q Were you ever invited to testify under oath before
10 congress about your work and your -- on the topics of asbestos
11 related disease?

12 A Yes, I did. I testified before the judiciary committee
13 two or three times.

14 Q Have you ever been recognized by a federal court as an
15 expert in asbestos related medical issues?

16 A Yes, I have.

17 Q On what topics?

18 A Internal medicine, occupational medicine, epidemiology of
19 asbestos related disease, diagnosis, treatment. I think that
20 probably covers it.

21 Q Have you also been recognized by state courts on those
22 subject matters?

23 A Yes, I have.

24 MR. FINCH: Your Honor, at this time the plan
25 proponents would proffer Dr. Welch as an expert in internal

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1 medicine, occupational medicine, the epidemiology of asbestos
2 related diseases, and the diagnosis of asbestos related
3 diseases.

4 UNIDENTIFIED SPEAKER: (Indiscernible)

5 THE COURT: All right, she is accepted as an expert
6 on those topics.

7 MR. FINCH: Thank you, Your Honor.

8 Q Dr. Welch, have you ever served as an expert both
9 consulting and testifying for an asbestos claimants committee?

10 A Yes.

11 Q In addition to your work in -- are you an expert for the
12 Grace asbestos claimants committee?

13 A Yes.

14 Q And in addition to your work here have you worked with
15 asbestos claimants committees in other bankruptcy cases?

16 A Yes, I have.

17 Q What are the two main topics of opinions that you've been
18 asked to provide information to the Court about today?

19 MR. FINCH: Next slide, please.

20 A The large picture was -- I was asked, and I can explain
21 today, I evaluated the medical and exposure criteria in the TDP
22 overall. But I specifically worked on a new category that was
23 added for this TDP on the severe disabling pleural disease
24 which is the level 4B. And Mr. Inselbuch was talking about
25 that earlier this morning, and for both of them to give an

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1 opinion whether they're medically reasonable.

2 Q Okay. What preparation did you do with respect to those
3 two areas of work?

4 A I looked at what existed in previous TDPs, some of which I
5 was familiar with because I had worked on previous bankruptcies
6 as we just talked about. And looked at the medical literature
7 about asbestos related disease that's relevant to those
8 categories which is really defining exposure and defining
9 disease. And then for the level 4B in particular I looked at
10 all the literature I could find relating to severe disabling
11 pleural disease, what's the best way to define it, level
12 impairment. In addition, I looked at all the Libby specific
13 information, government reports, published papers that related
14 to Libby, and testimony and reports from Dr. Whitehouse and Dr.
15 Frank that talk about the impact of pleural disease in that
16 population so I could kind of understand what the questions
17 were and design a TDP that I thought was medically reasonable
18 in that context.

19 Q Did you read any government reports about the asbestos
20 containing vermiculite being shipped to other places outside of
21 Montana?

22 A Yes.

23 Q Would you turn in your exhibit binder to Exhibit -- Plan
24 Proponents' Exhibit 163.

25 A I have that. Yes.

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1 Q What is that document, Dr. Welch?

2 A It's a October, 2008 report from ATSDR. It's entitled,
3 "Summary Report Exposure to Asbestos Containing Vermiculite
4 from Libby Montana at 28 Processing Sites in the United
5 States."

6 Q And what did you learn from your consultation of this
7 report?

8 A Well, that asbestos containing vermiculite from Libby was
9 shipped to more than these 28 sites. I think it's 200 sites
10 across the country. And they did an evaluation at these --
11 specifically at these 28 sites that had received asbestos
12 containing vermiculite from the mine. And the report documents
13 the potential for exposure to vermiculite at these sites.

14 MR. FINCH: Okay. Your Honor, at this time we would
15 offer Plan Proponents 163.

16 MR. HEBERLING: Objection. It's a hearsay report.
17 It's medical literature --

18 COURT CLERK: You have to use the microphone.

19 THE COURT: Leave it down, but turn it on.

20 MR. HEBERLING: It is green.

21 THE COURT: Oh. It's working now. Go ahead.

22 MR. HEBERLING: Yes. This is medical literature and
23 under 80318 it's not accepted into evidence. So our objection
24 goes to that.

25 MR. FINCH: Your Honor, I think this is not medical

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1 literature. This is a governmental report that comes into
2 evidence pursuant to Federal Rule of evidence 8038, the records
3 of an administrative agency reporting findings required by an
4 administrative agency.

5 THE COURT: Then have the witness please identify
6 that fact on the record, because it's not --

7 MR. FINCH: Your Honor, I will not offer the exhibit
8 at this time.

9 MR. HEBERLING: If it's offered as a government
10 report I would not object.

11 MR. FINCH: I withdraw the offer of the exhibit, Your
12 Honor.

13 THE COURT: All right.

14 Q Did you, in addition to reading the published literature
15 that's publicly available and published in the medical journals
16 about asbestos disease in and around Libby, Montana, did you
17 also read nonpublic information about Libby disease? By that I
18 mean either the expert witness reports or the testimony of the
19 Libby doctors?

20 A Yes, I did.

21 Q And did you talk with any of your colleagues in the
22 asbestos medical field about Libby specific issues as part of
23 your work in preparation for the work you did for the Grace
24 asbestos claimants committee in this case?

25 A Well, I actually specifically about Libby I had talked a

1 while ago to Steve Levine at Mt. Sinai. And he's one of the
2 people who had worked a little bit with Dr. Whitehouse and Dr.
3 Frank on analysis of the data -- of the screen medical results
4 from Libby. And I don't recall other people I specifically
5 talked about Libby issues to.

6 Q Did you have occasion to meet with either Dr. Whitehouse
7 or Dr. Frank as part of your work in this case?

8 A Yes, I did. We met in Philadelphia for a day.

9 Q Okay. I'm going to ask you a lot of questions about
10 whether the various medical and exposure criteria that are set
11 forth in the expedited review section of the Grace TDP are
12 reasonable or medically reasonable. Can you explain to the
13 Court what you mean by medically reasonable in the context of
14 the opinions about the Grace's TDP criteria that you are going
15 to be discussing here today?

16 A Yes.

17 Q Could you tell the Court, please.

18 A Yes. When I say it's medically reasonable, I'm saying
19 that it's grounded in the medical literature and that
20 specifically if someone meets a criteria that set forth the
21 expedited review that the trust can be confident that that
22 individual has an asbestos related disease that's caused in
23 whole or in part by exposure to Grace products.

24 Q If someone doesn't meet that expedited review criteria
25 does that mean that they don't have an asbestos related

1 disease?

2 A No.

3 Q What does that mean to you in the context of a medical
4 expert?

5 A Well, the criteria is set so that it's in a way those are
6 very clear-cut cases. So that's why I said, you know, if you
7 meet these criteria that trust can be confident that that
8 person has an asbestos related disease. There are going to be
9 other people definitely who don't meet those criteria, but have
10 an asbestos related disease that's caused by Grace. But
11 there's something about their case that requires a little more
12 review. And that's what the individual review is for.

13 Q You mean you would want more individualized review of that
14 situation.

15 A Correct. There might be more information you'd want than
16 what's required by the expedited review which only has a few
17 requirements. So someone doesn't meet one of them they might
18 meet it by having some other test available. But because of
19 the nature of other testing or something about the individual
20 it really requires looking at the sum total of the information
21 on that individual if they don't meet those specified expedited
22 review criteria.

23 Q Okay. With that preface let's talk about non-malignant
24 diseases in general and the TDPs criteria for severe disabling
25 pleural disease in specifics. First of all, is there some kind

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1 of authoritative document put out by the American Thoracic
2 Society that describes how you should go about diagnosing non-
3 malignant asbestos diseases?

4 A Yes.

5 Q Go ahead. Sorry.

6 A In 2004 the American Thoracic Society published a guidance
7 document that I probably wouldn't get the title right, but
8 it's, you know, diagnosis of non-malignant asbestos related
9 diseases.

10 Q Is it -- could you turn in your exhibit book to Exhibit
11 147. What is Exhibit 147, Dr. Welch?

12 A It's the document I was referring to from the American
13 Thoracic Society, Diagnosis and Initial Management of Non-
14 malignant Diseases Related to Asbestos. It was published in
15 the American Journal of Respiratory and Critical Care Medicine
16 in 2004.

17 Q And do you regard this as authoritative as to the
18 diagnosis and management of non-malignant diseases?

19 A Yes.

20 Q Could you describe just briefly what the American Thoracic
21 Society process is to create this document?

22 A Yeah. The American Thoracic Society is a professional
23 organization of pulmonary specialists. And they have a process
24 for creating their own -- the ATS guidance documents that is --
25 put together a committee and the committee is established to

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1 not have any substantial conflicts of interest of the committee
2 members. They produce the report which then goes to the peer
3 review and goes to the board of the ATS before it's approved
4 and finalized.

5 Q Okay.

6 MR. FINCH: Could you put the slide show back up, and
7 specifically slide 9. Okay. Your Honor, at this time we would
8 offer the 2004 American Thoracic Society document, Plan
9 Proponent's Exhibit 147.

10 MR. HEBERLING: No objection, Your Honor.

11 THE COURT: It's admitted.

12 Q Dr. Welch, what does the American Thoracic Society
13 statement tell you about what criteria are required to diagnose
14 a non-malignant asbestos related disease?

15 A It requires evidence of disease, and that can be
16 radiologic or pathologic primarily. And then it requires
17 exposure to asbestos, and appropriate latencies. So the time
18 between first exposure and disease needs to be consistent with
19 what we know to be the appropriate lag time. It varies -- the
20 criteria on the x-ray or pathology obviously vary depending on
21 whether you are talking about asbestosis or asbestos related
22 pleural black. But primarily pathologic findings, evidence of
23 exposure.

24 Q Are there different asbestos related non-malignant
25 diseases or are they all the same disease?

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1 A They're not all the same. No.

2 Q Can you describe the difference -- the different diseases?

3 A There are sort of two categories, and then subcategories.

4 Q Okay. Why don't you describe the two broad categories
5 first.

6 A Two broad categories are asbestosis which is interstitial
7 fibrosis. It's scarring in the lung parenchyma, right in the
8 lung itself, and asbestos related pleural scarring. The pleura
9 is a lining around the lung so when the scarring occurs in the
10 pleura it's actually outside the lung in the pleura. And that
11 occurs because when asbestos is breathed in it's transported
12 through the lung out into that pleural space as part of its --
13 the body's attempt to get it out of the body. So it can reside
14 in there and cause a scar to form.

15 Q Okay, we'll get into a little bit more detail about
16 pleural diseases in just a minute. But does the 2004 American
17 Thoracic Society document give you any guidance as to how to
18 grade the severity of asbestos related non-malignant diseases
19 with respect to lung function tests?

20 A No, it doesn't.

21 Q And is functional impairment required to make a diagnosis
22 of a non-malignant asbestos disease?

23 A No.

24 THE COURT: I'm sorry, I didn't hear the question.

25 Q Is functional impairment required by the American Thoracic

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1 Society to make a diagnosis of a non-malignant asbestos
2 disease?

3 A No. You can make the diagnosis based on either an x-ray,
4 a CAT scan or a pathology and appropriate exposure. Because
5 you can have the disease without it having to reduce your lung
6 function. The document does talk about the patterns of lung
7 function impairment that you would get, but it doesn't require
8 that lung function abnormalities be present to make the
9 diagnosis.

10 Q Okay.

11 MR. FINCH: Next slide, please.

12 Q Dr. Welch, what is a pleural plaque?

13 A Pleural plaque is a scar on the pleural surface. The
14 simple way.

15 Q A scar on the pleural surface caused by what? Are there
16 asbestos related pleural plaques?

17 A Asbestos related pleural plaques come -- other things that
18 cause inflammation in the pleural space can also heal with a
19 scar. But the most typical -- particularly in the picture that
20 we're showing here. And where that's located it's most
21 typically caused by asbestos.

22 Q Do pleural plaques generally impair lung function?

23 A It's always easier to talk about things that we have an
24 agreed upon terminology.

25 Q Okay.

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1 A Now, I and a lot of people, I think, now are beginning to
2 make the distinction between pleural plaque and diffused
3 pleural thickening. But there's been, if you look at the
4 medical literature from the '50s onward the people aren't
5 always using the same terms. But when I'm talking about
6 pleural plaque I'm talking about really what we're seeing in
7 this picture here which is a circumscribed area of scarring on
8 the pleural surface that does not include the angle at the
9 bottom of the lung there that would cause costophrenic angle.

10 Q And does that type of disease of the lung which, for
11 purposes here we'll call pleural plaque and the TDP we'll call
12 pleural plaque, does that cause -- generally speaking does that
13 cause any kind of lung function decline?

14 A In population studies there's a little bit of lung
15 function decline, three percent, five percent, but generally it
16 doesn't cause a significant impairment or what we would call a
17 clinically significant impairment of lung function.

18 Q And just define for the Court what you mean by a
19 clinically significant impairment of lung function.

20 A Something that someone would notice. It would cause them
21 shortness of breath. Often it's, you know, lung function is
22 considered normal until people drop below about 80 percent of
23 their predicted normal value. So something of -- as long as
24 you're in the 90 percent range that's not clinically
25 significant.

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1 MR. FINCH: Next slide, please.

2 Q You mentioned in your prior answer something called the
3 diffused pleural thickening as distinguishing it between that
4 and pleural plaque. What is diffused pleural thickening?
5 Could you tell the Court what is diffused pleural thickening?

6 A Sure. There's two pleural surfaces and sort of two
7 minutes on lung anatomy. If you take a deep breath you're
8 using your muscles of the chest to expand your chest wall and
9 the lung has to follow. And the reason it does is because
10 there's a pleural surface on the lung and one against the chest
11 and there's a vacuum in between. So you breathe in, your lungs
12 go out. And those two pleural surfaces have a little bit of
13 fluid in between them and they slide so that your lung can move
14 independently. It's really floating inside your chest and it's
15 in and out like out a bellows. So that the one on the chest
16 wall side is called the parietal pleura and the one on the lung
17 side is called the visceral like viscera in innards.

18 So what we know clinically is that scarring that
19 involves the visceral pleura tends to have a much more
20 significant impact on lung function than what causes the
21 parietal pleura. And the reason is because it's scarring
22 around the lung, and when you get that scarring around the lung
23 it's essentially anchoring the lung to the chest wall. When
24 you breathe in the lung can't move independently, it can't
25 expand appropriately.

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1 Using the definition that's now been codified by the
2 International Labor Organization when you read a chest x-ray
3 diffused pleura thickening involves blunting of the
4 costophrenic angle. And that's the angle at the base of the
5 lung where the lung meets the diaphragm at the base of the
6 lung. And there have been a number of really good studies that
7 show that if what we wanted measured looking at the x-ray is we
8 want to find a finding on the x-ray that predicts that visceral
9 scarring and therefore is related to significant impairment of
10 lung function. Blunting of the angle is the best predictor on
11 the x-ray of scarring, that significant clinical scarring.

12 Q Okay. Just for a minute, definitionally, what's the
13 parenchyma of the lung?

14 A That's the body of the lung. That's the part of the lung
15 where the gas is exchanged. Oxygen goes in --

16 Q The meat part of the lung?

17 A Yeah.

18 Q And the pleura is the stuff around it.

19 A The pleura is the stuff around it.

20 Q And you mentioned blunting of the costophrenic angle.

21 MR. FINCH: Can I have the next slide, please. Slide
22 12.

23 A Yeah, this is a --

24 Q What does slide 12 show?

25 A This is one of these, a picture is worth a thousand words.

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1 The one on my left -- I guess --

2 Q The one with the red -- how about the one without the red?

3 A The other one's the normal lung. The one without the red
4 on it is the normal lung. And you can see that normally on
5 both sides there's a fairly deep angle on the side where the --
6 as you come down along the ribs and go along the diaphragm.
7 And then the one with the red shows blunting of the
8 costophrenic angle. So on the -- that person's other side, the
9 one that's not marked with red you can still see the angle, but
10 on this side essentially scarring has reduced the -- encased
11 the lung and reduced that angle. So that's pretty significant
12 blunting of the angle shown by where the lung used to be before
13 the scarring and then the yellow arrow showing us the lung is
14 shrunk and encased. So that's what we call blunting of the
15 costophrenic angle. Now that's a very dramatic example, but
16 it's good to have a dramatic example when trying to explain
17 what's happening.

18 Q Now with that as background, let's turn to the severe
19 disabling pleural disease which is category 4B of the Grace
20 TDP. First of all, Dr. Welch, who designed the medical and
21 exposure criteria for severe disabling pleural disease in the
22 expedited review section of the Grace TDP?

23 A Well, I designed the medical, and the exposure criteria is
24 brought in really from the other parallel exposure criteria,
25 it's from the 4A, the severe asbestosis category.

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1 Q Okay. In your opinion as a doctor that specializes in
2 asbestos disease would you hold the opinion to a reasonable
3 degree of medical certainty across all the disease categories
4 if someone meets the exposure criteria and the medical criteria
5 that their asbestos related disease was caused --

6 MR. HEBERLING: Objection.

7 Q -- at least in whole or in part by exposure to Grace
8 asbestos?

9 A Yes.

10 MR. HEBERLING: Objection, leading.

11 THE COURT: It is leading, but I think in this
12 instance it's irrelevant. So the objection's overruled. Wait
13 until I make a note, please. All right. Thank you.

14 Q Okay. How did you go about -- what did you do to allow
15 you to design the medical criteria for the severe disabling
16 pleural disease category in the Grace TDP?

17 A Well, there's two parts of it. There's defining what on
18 x-ray is medically reasonable so the trust can be confident
19 this is an asbestos related disease that causes impairment.
20 And then there's the pulmonary function criteria that define
21 the severe disability. Now the --

22 Q Did -- sorry. Go ahead.

23 A The pulmonary function criteria matched the criteria that
24 are set for asbestosis which is severe disabling asbestosis
25 which is 4A. So really what we did -- what I did in creating

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1 4B was to say we've already decided in 4A that a severe
2 impairment is these PFTs and those of that -- those PFT
3 criteria have been used in previous trusts. And I think
4 they're medically reasonable. They do define a severe
5 impairment from an asbestos related disease. And we can walk
6 through details of that if you want to.

7 But the other part of setting up the criteria was to
8 say okay, what on x-ray, we're going to use x-rays for people
9 to send in a claim to the trust. What criteria should we use?
10 So I turned to the International Labor Organization's standards
11 for classifications of x-rays for dust diseases of the lung,
12 and they have a definition for diffused pleural thickening.
13 And it's -- the criteria are based around that definition.

14 Now undermining the setting up the criteria I also
15 reviewed the literature to be confident that I could say that
16 of people with pleural scarring from asbestos of any kind, it's
17 the people with diffused pleural thickening who will have the
18 significant impairment. So this criteria, the 4B, says you
19 have to have diffused pleural thickening to get into 4B. So if
20 somebody has pleural thickening that doesn't meet that
21 definition that we've set, they would need an individualized
22 review.

23 Q Okay. You mentioned that you had reviewed medical
24 literature --

25 MR. FINCH: Next slide, please.

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1 Q -- and other things. Could you describe just briefly what
2 you -- the main points of what you learned about severe
3 disabling pleural disease from your review of the medical
4 literature and the 2000 ILO guidelines?

5 A Yes. Generally when you look at populations of
6 individuals exposed to asbestos, about ten, 15 percent of all
7 the pleural disease falls into this diffused pleural thickening
8 category. So it's a small proportion of people with asbestos
9 disease, but it's present in almost every population study.
10 And that if you -- on studies there have been a couple of
11 really nice studies that have taken people who have a diffused
12 pleural thickening including blunting of the costophrenic angle
13 and compared their pulmonary function tests to people with
14 other kinds of pleural changes, pleural scarring from asbestos,
15 and those studies demonstrate that if you have blunting of the
16 angle you're likely to have decreased pulmonary function
17 testing. And if you don't you're unlikely.

18 There was a paper by Lilis that does that very well.
19 There's a recent paper by Omaly, and then there's some others.
20 And I think that the American Thoracic Society consensus
21 document they talked about reflects this growing consensus that
22 diffused pleural thickening should be defined as having
23 blunting of the angle. And my review of the literature
24 confirmed that for me that that is the finding that identifies
25 the people who have significant lung function impairment.

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1 Q Okay. You mentioned an article by a Lilis.

2 MR. FINCH: Can I have the next slide, please.

3 Q What was the Lilis article? Can you describe that study
4 to the Court and what it demonstrates?

5 A Yes. Ruth Lilis was a professor at Mt. Sinai and part of
6 the Irving Selikoff sort of asbestos study group. And you may
7 or may not be familiar with the insulator study, but its basis
8 from -- a lot of what we know about asbestos disease, they
9 followed 17,000 members of the Insulator's local across the
10 United States. This paper was based on detailed pulmonary
11 function tests on about 1500 of those insulators. And what Dr.
12 Lilis did here was she created an index based on how much
13 pleural scarring was present on the chest x-ray. Basically the
14 length and the width and calcifications and a bunch of
15 different points. And you can see on the slide, you can have a
16 score as small as one and a score greater than 22 is the
17 category on this score.

18 But what this slide illustrates is people on the left
19 are people with pleural scarring but without blunting of the
20 angle, and on the right it's people who do have blunting of the
21 angle. And it's a pretty dramatic difference in that the
22 people on the right side who have diffused pleural fibrosis,
23 their pulmonary function tests are uniformly under that 80
24 percent when on the left side the people who have pleural
25 scarring absent blunting of the costophrenic angle they're

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1 generally as a group in numbers they're close to 80 percent.
2 You need quite a bit scarring to drop it even down to 75
3 percent in the category that had an index as high as 22. So I
4 think just visually it gives you a very good picture that it is
5 blunting of the angle that drops the lung function so
6 substantially.

7 Q And of these two charts these aren't something -- where do
8 these come from? Do these come right from the paper?

9 A Yeah. These come from the paper, published in 1991. It
10 was in American Journal of Industrial Medicine.

11 Q Could you turn to Exhibit 41 in your exhibit book, Dr.
12 Welch, Plan Proponents 41.

13 A And that's the paper that I was referring to.

14 Q That's the Lilis paper?

15 A Correct.

16 Q And on Page 154 -- excuse me 156 of that document it's
17 PP002232, is the Bates number.

18 A Correct. That's where that slide comes from.

19 Q That's where the two graphs come from.

20 A Correct.

21 MR. FINCH: Your Honor, at this point we would offer
22 Plan Proponents' Exhibit 41, not for it's truth, just for the
23 fact that Dr. Welch considered it, and it was something that
24 was available to her in the medical literature.

25 MR. HEBERLING: Counsel, this is not something we've

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1 discussed, but I would propose that we allow the medical
2 literature in generally on this basis. Obviously if I'm not
3 going to object to yours, I would expect that you not object to
4 ours. So if we can make that kind of agreement I'm happy to
5 have it go in.

6 MR. BERNICK: I don't believe that the literature
7 should come in generally. It can -- if the article itself has
8 historical significance as a fact that prompted something. I
9 don't know that this is being proffered for that purpose. But
10 at least -- I don't think that Grace is prepared to stipulate
11 to the actual admission of scientific literature, nor do I see
12 the point for it. It comes in to inform the Court's assessment
13 of the expert and this reliance material and certainly the
14 Court can have copies. But I don't think that they're properly
15 admissible unless the historical fact of their having been
16 written is of consequence such as a standard or something of
17 that kind.

18 THE COURT: I don't think --

19 MR. FINCH: The only historical fact in which it's
20 being offered, Your Honor, is if this is -- this distinction
21 between the lung function decline in diffused pleural
22 thickening versus pleural plaque. It has been noted and
23 described in the medical literature for almost 20 years. I'm
24 not sure where I am with Mr. Bernick on this, but I will --
25 it's been marked for purposes of identification, and we will

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1 either work out a stipulation with the Libby claimants as to
2 the purpose for which this is admitted or not.

3 THE COURT: One second, Mr. Finch. Did we lose them
4 again?

5 THE CLERK: Yes, but I don't know why.

6 UNIDENTIFIED ATTORNEY: Do we need to --

7 THE COURT: We'll just wait a second. I think for
8 purposes (indiscernible - phone disconnection) this is clearly
9 a (indiscernible). I don't think it has independent
10 significance and relevance as admissible evidence, but it is
11 clearly something that the witness is able to take cognizance
12 of and has --

13 COURT CALL: Thank you for standing by. May I have
14 the name of the Court please?

15 THE CLERK: Yes, this is for Judge Fitzgerald again.
16 We keep getting disconnects.

17 COURT CALL: I'm placing you back online.

18 THE COURT: As I was saying, I believe it's her
19 testimony that is the relevant evidence, and this document
20 itself has -- I don't believe has particular independent
21 evidential value. If you can work out a stipulation with the
22 Libby claimants to that effect, it's fine. I don't have any
23 problem taking it as something that the witness has testified
24 she used in her examination. I think that's proper. It's not
25 hearsay provided that it's not being used for the truth of the

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1 matter and your offer excludes it from that purpose. So, if
2 you two want to work out a stipulation about medical documents
3 I'm happy to hear it. Otherwise, I don't think it is -- I will
4 take it as an exhibit that she has used, but only for that
5 purpose and no other.

6 MR. HEBERLING: For the record, Your Honor, we'll
7 maintain our hearsay objection under (indiscernible), but I do
8 propose that this sort of literature be received, but not
9 admitted as documents the witnesses considered.

10 THE COURT: I agree that it's proper in that
11 capacity. The witnesses identified it in that capacity. And
12 as long as it's not offered for the truth there is no hearsay
13 objection that needs to be stated because I'm not accepting it
14 for the truth, only for the fact that the witness considered
15 it, and it is part of a medical literature document. So, I'll
16 take it on that limited basis.

17 MR. HEBERLING: Okay.

18 THE COURT: Let me make a note.

19 MR. BERNICK: I just -- I don't mean to be
20 persnickety about this, but from our point of view we don't
21 want a sauce rule that's going to come out of this that says
22 that medical articles actually come into evidence.

23 THE COURT: I'm not accepting it for purposes other
24 than for what it was offered which is that this witness was
25 aware of it and considered it in rendering her opinion. That's

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1 all.

2 BY MR. FINCH:

3 Q That was the only purpose for offering it to Your Honor.

4 Okay. I believe you mentioned before that diffuse pleural
5 thickening has been a diagnostic entity that's been defined in
6 the medical literature. For how long has it been recognized as
7 a separate disease from, say, the asbestosis?

8 A Oh. I mean, I don't know how far back to date it, but
9 I've seen papers that date back to the '60s talking about
10 diffuse pleural thickening.

11 Q Did you examine the question of whether pleural disease
12 that was being suffered by people in Libby, Montana was a new
13 and different disease than pleural disease described in the
14 medical literature outside of Libby?

15 A Yes.

16 Q And what did you conclude about that?

17 A As far as I could tell the pleural disease in Libby is the
18 same pleural disease that we see in other people exposed to
19 asbestos.

20 MR. FINCH: The severe disabling pleural disease,
21 Your Honor, categories, is found in the Grace TDP at Page 26.
22 And if we could have Exhibit 277.04, Page 26?

23 Q Dr. Welch, did you have an opinion whether the severe
24 disabling pleural disease category is medically reasonable?

25 A Yes, I do think it's medically reasonable.

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1 Q You referred to consulting the 2000 ILO for the
2 radiographic criteria for this disease.

3 A Yes.

4 Q Could you turn in your exhibit book to Exhibit Plan
5 Proponents 115?

6 A Yes. That's the guidelines for the use of the ILO
7 classification, the 2000 revised edition.

8 Q And could you turn to Page 7 of that document?

9 A Yes.

10 Q And what is found on Page 7 of the 2000 ILO?

11 A It's part of the definition section, and that's where the
12 definition of diffuse pleural thickening is found in this book.

13 Q Could you read the -- does the 2000 ILO require blunting
14 of the costophrenic angle in order to define something as
15 diffuse pleural thickening?

16 A Yes, it does.

17 MR. FINCH: Your Honor, we offer at this time Plan
18 Proponent's 115 for the same purposes that I offered the other
19 document, not for its truth, but to show that the literature
20 exists and it was something considered by Dr. Welch as part of
21 her work for the Grace Asbestos Claims Committee in this case.

22 UNIDENTIFIED ATTORNEY: No objection.

23 THE COURT: All right. Submitted for that purpose.
24 One minute, please. All right. Thank you.

25 MR. FINCH: Could you go to Slide 19 in the slide

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1 show, please?

2 Q The Libby claimants had made a series of criticisms about
3 the severe pleural disease category in the TDP. One of those,
4 Dr. Welch, is the blunting of the costophrenic angle
5 requirement. In your view, is it -- is that a well-founded
6 criticism? Is it unreasonable to require blunting of the
7 costophrenic angle?

8 A No, I think it's reasonable. It's -- blunting of the
9 angle is now part of the standard definition of diffuse pleural
10 thickening by the international agency that tells us how to
11 read these chest x-rays.

12 Q That's what, the ILO?

13 A That's the ILO. The -- you know, the --

14 Q Is the American Thoracic Society document also --

15 A The American Thoracic Society has adopted that definition.
16 The ILO system is used by B-readers in this country. A
17 B-reader is someone trained and certified to read chest x-rays
18 for dust diseases, and under some regulations under the mine
19 regulations and under some OSHA regulations, people who read
20 chest x-rays have to be B-readers, and this is the system they
21 use. So, it is the standard notation now from the ILO and the
22 NIOSH B-reading system is to include blunting of the angle.

23 Q What about the extent and width requirement? In your view
24 is that medically reasonable to have those requirements in the
25 Grace TDP for severe disabling pleural disease?

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1 A Yes.

2 Q And where do those requirements come from in the medical
3 literature?

4 A Well, they're in the ILO requirement in the ILO -- the ILO
5 defines the numbers that we -- however we refer to it in the
6 TDP. The purpose of defining extent and width is a lot to
7 be -- so the trust can be sure that pleural thickening is
8 really there which is the purpose of using the ILO system.
9 It's standardizes it rather than it being debated in the eye of
10 the beholder in some sense. And I think it's -- we pointed out
11 if someone doesn't meet the extent and width requirements but
12 has severe impairment, they can come back for an individual
13 review and certainly be awarded if that thickening is there.

14 Q In the expedited review criteria for severe disabling
15 pleural disease, there's no way to qualify for that category on
16 expedited review by using a CT scan -- HRTC scan which is
17 something that the Libby claimants have criticized the TDP for.
18 Could you explain to us your views about whether or not that's
19 reasonable not to allow CT scans as a way to qualify in the
20 expedited review process?

21 A Yes. You know, a CT scan certainly can show pleural
22 scarring, but we don't yet have a standard system for
23 classifying CT scans for any kind of asbestos-related disease
24 or for asbestos-related pleural scarring, so -- which we do on
25 the x-ray.

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1 So, if some -- so, the CT scan, since we don't have a
2 system where we could say to a claims examiner or someone
3 processing the trust, if they checked this box on this form
4 then they qualify for expedited review. We can do that on the
5 x-ray. We can't do it for a CT scan. So, a CT scan could come
6 in as part of an individual review -- individualized review.

7 Q So, it's your understanding that CT scans could be used in
8 an individual review. They're just not one of the expedited
9 review criteria?

10 MR. HEBERLING: Objection. Leading.

11 THE COURT: Sustained.

12 Q Do you have any understanding as to whether CT scans can
13 be used in individual due process?

14 A Yes. CT scans could and certainly should be used in that
15 process. And as I guess what I was saying in my answer, maybe
16 I went too far, I think they need to be used in individualized
17 review rather than expedited review because we don't have a
18 standard classification for the CT scan that could be put into
19 a simple expedited review. So, they're going to default to the
20 individualized review category, and that's where they need to
21 be looked at and evaluated.

22 Q And by standardized process, is that something like the
23 ILO grading system for x-rays?

24 A Right. That's right. Now, we don't have an ILO system
25 for CT scans. I mean, you know, we may in another decade, but

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1 at the present time we don't.

2 Q Okay. And the Court has in other context heard lots about
3 the ILO standards, but is that the 1/1, 1/0? Is that the ILO
4 grading system?

5 A That's correct.

6 MR. FINCH: Your Honor, I don't think we need to go
7 into the details of that here. That may be beating a horse
8 that is long since dead.

9 Q Can you describe briefly what DLCO is?

10 A Yes.

11 THE COURT: I'm sorry. I couldn't hear you.

12 MR. FINCH: Sorry.

13 Q Could you describe briefly what DLCO is?

14 A DLCO --

15 Q In the context of lung function tests.

16 A Right. DLCO is diffusion capacity, and it's one standard
17 measurement of lung function. What we use in the TDP is vital
18 capacity and total lung capacity. They're a measure of lung
19 volume. And diffusion capacity measures gas exchange, so it's
20 measuring a different part of lung function.

21 Q Do you think it is medically reasonable not to have a
22 reduction in DLCO standing alone as a way to qualify for
23 expedited review for any of the non-malignant disease
24 categories?

25 A Yes, I do. I think that the lung -- reduction in total

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1 lung capacity or reduction in force vital capacity is a measure
2 of lung restriction, and that's the characteristic finding of
3 asbestos-related disease. A reduction in diffusion capacity
4 can occur with restrictive lung disease, but can also occur,
5 and significantly does occur with smoking-related lung
6 injuries. And you can't differentiate it based on the
7 diffusion capacity. So, someone who has an isolated reduction
8 in diffusion capacity without anything else that tells you it's
9 restricted lung disease, it could be caused by many other
10 medical conditions.

11 Q Another thing the Libby claimants criticize is that for
12 the non-malignant disease categories that pay more money for
13 lung function impairment, there has to be certain scores on an
14 FEV1/FVC ratio. First of all, could you turn to Slide 22 in
15 your exhibit book and tell the Court what an FEV1/FVC ratio is?

16 A In spirometry, which is the simple lung function test that
17 you can do in a physician's office, the individual takes a
18 really deep breath and blows out as hard and fast as they can.
19 And the total amount of air they get out is called the force
20 vital capacity. They usually have to blow out for six seconds
21 and then in six seconds you can get all the air out.

22 And if you look at the curve you can see that over
23 that six seconds a great big part of it comes out in the
24 beginning. If you've ever done this test you know that those
25 last three seconds are painful because you feel like you've

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1 completely emptied your lung, and somebody keeps telling you
2 go, go, go, go, go.

3 What comes out in the first second is called the
4 FEV1. And in a normal person about 80 percent of your lung
5 function comes out in the first second and the other 20 percent
6 comes out over the next five seconds. So, the FEV1/FVC ratio
7 is a measure of air flow. Does that make sense? I mean, I
8 explained this to a lot of people and it often takes like six
9 iterations because most doctors don't understand it either.

10 Q Ten for me maybe, but --

11 A Ten for you, okay. Well -- so, you weren't paying
12 attention the first four maybe. So, that the FEV1/FVC ratio,
13 as the lung -- if there's obstruction, a smaller proportion of
14 the air comes out in the first second because the person's
15 having to push against obstruction to get it out. So, that
16 ratio starts to go down, and that's what you see in the second
17 graph. We see that on the one that -- it's not quite as sharp
18 at the top corner. It gets to almost the same lung volume at
19 six seconds, but at the first second it's down -- it's at two
20 and a half versus almost three and a half.

21 So, FEV1 will go down when lung volume goes down, but
22 the ratio of FEV1 to FVC is the best measure on spirometry of
23 obstruction. The reason that matters here is that asbestosis
24 and diffuse pleural thickening make the lungs smaller, so they
25 cause restriction. So, in a case of pure severe diffuse

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1 pleural thickening you'll see a reduction in lung volume,
2 reduction in that FVC, but the amount that comes out in the
3 first second will be proportionally the same. So, that ratio
4 will stay around -- 80, as you get older, your ratio goes down,
5 so 70, something like that.

6 If the ratio goes down more than that there's a
7 component of obstructive lung disease which is often caused by
8 smoking. So that in the sense that the expedited criteria are
9 set to pick out the really clear cut cases. The criteria are
10 set to have people with significant obstructive disease have to
11 go through individual review. It's only a small amount of
12 obstructive disease that can come through on the expedited
13 criteria. But, when that ratio starts to drop down to 60
14 percent, someone needs to look at the case and determine
15 whether asbestosis is still a significant contributing factor
16 to the impairment because they clearly have obstructive disease
17 as well.

18 Q And is the FEV1/FVC requirement something that's required
19 in all of the non-malignant disease categories that requires
20 some kind of decline in lung function to get additional
21 compensation?

22 A Yes.

23 Q And do you believe that having that is medically
24 reasonable?

25 A Yes, I do.

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1 Q Okay. Let's discuss very briefly a few other aspects of
2 your testimony.

3 MR. FINCH: Could you turn to Slide 23?

4 Q Dr. Welch, what part of the lung does mesothelioma attack?

5 A Mesothelioma arises in the pleural surfaces of the lung.
6 It's not in the parenchyma lung itself. It comes out -- the
7 mesothelial cells make up the pleural surfaces. So, it can be
8 the pleural space, it could be the diaphragm, the pleural space
9 on the diaphragm. Any place where there's a pleural surface.

10 Q And what is the medical literature showing us to be the
11 prognosis of someone who's diagnosed with mesothelioma?

12 A Someone who's diagnosed with it will die of it in 95
13 percent of the cases.

14 Q Do you have an opinion about whether the medical and
15 exposure criteria for mesothelioma are medically reasonable?

16 A Yes, I do think they are medically reasonable.

17 MR. FINCH: And could I have Slide 26, please?

18 Q And why is that?

19 A Why medically reasonable?

20 Q Why is the mesothelioma exposure and medical criteria
21 reasonable?

22 A Well, the diagnosis of mesothelioma is based on pathologic
23 examination of the tissue, and that's standard practice, so
24 that's required by the TDP. And then the -- there's not a lot
25 of exposure requirements -- I mean not a long exposure required

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1 because we know from many -- a lot of medical literature that
2 mesothelioma can occur after quite limited exposure to
3 asbestos. There are cases from, you know, people who worked
4 for a couple of months in a factory. There's just many, many
5 case series of low dose exposures, household contacts, people
6 who never had occupational exposure to asbestos causes
7 mesothelioma.

8 And all of the international agencies that have
9 looked at it say there is no level below which risk doesn't
10 exist. So, the International Agency for Research on Cancer,
11 the World Health Organization, National Cancer Institute, they
12 all say there's no safe level of exposure to asbestos as far as
13 mesothelioma's concerned.

14 Q Is there epidemiological literature that demonstrates, in
15 your view at least, that asbestos exposures below one fiber
16 year can cause mesothelioma?

17 A Yes. Absolutely.

18 Q Is it correct that Slides 27 and 28 list some of the
19 literature that support your opinion that low doses asbestos
20 exposure causes mesothelioma?

21 A That's correct.

22 Q Does exposure to chrysotile asbestos cause mesothelioma?

23 A Absolutely. Yes.

24 Q What is the official position of the United States
25 Government about how likely chrysotile is to cause mesothelioma

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1 as compared to other asbestos fiber types?

2 A Well, the EPA, OSHA, NIOSH, all say that all fiber types
3 cause asbestos. And EPA tried to figure out whether they could
4 assign even a different potency or risk to the different fiber
5 types and decided that they would not do that, and they'll
6 continue to treat them as if they all have the same potency.

7 Q Did that EPA review happen recently?

8 A Yes.

9 Q When?

10 A Last year.

11 Q And were you involved in providing testimony to the EPA
12 about that process?

13 A Yes, I was.

14 Q We talked about the exposure requirements under the TDP.
15 Do you have a view one way or the other as to whether the TDP
16 criteria for lung cancer are medically reasonable?

17 A Yes, I think they are.

18 Q The Libby claimants have said in their briefs that 100
19 percent of the people with lung cancer will qualify under the
20 TDP, is that correct?

21 A A hundred percent of the people in Libby would qualify?

22 Q No, 100 percent of the people with lung cancer diagnoses
23 would qualify for compensation under the TDP?

24 A No. I --

25 Q Let me rephrase that. Can you describe for me what the

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1 TDP requires in order to have -- to qualify an expedited review
2 for lung cancer?

3 A Well, it requires a diagnosis of primary lung cancer. And
4 then the exposure criteria include -- they have to have a
5 bilateral asbestos-related non-malignant disease as defined in
6 the TDP.

7 MR. FINCH: Could we have Slide 34, please?

8 A So, they have to have evidence on chest x-ray of some
9 non-malignant asbestos-related disease. And then in addition,
10 there are exposure criteria that are different depending on
11 whether someone from Libby or outside of Libby. The -- there's
12 a requirement of significant occupational exposure to asbestos
13 for -- and I think it's -- I won't talk about the Libby-
14 specific ones because I'm not sure I would get them all right,
15 but the significant occupational exposure to asbestos is a
16 fairly high bar. It requires a lot of exposure to asbestos.

17 Q And is that based on medical literature?

18 A Yes. It's based on the -- there was a conference in
19 1997 -- or it was published in 1997 in Helsinki that brought
20 people from all over the world to make a determination about
21 what level of asbestos exposure is required that you could
22 attribute a lung cancer to the exposure even in the absence of
23 a non-malignant disease.

24 And this significant occupational exposure is kind of
25 benchmarked around that. It's not -- it doesn't define it

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1 exactly the same way, but it's medically reasonable. It relies
2 on that information. So, if you apply the significant
3 occupational exposure criteria and the presence of the non-
4 malignant asbestos-related disease, it's very few of the
5 165,000 lung cancers in the U.S. every year that would qualify
6 for this.

7 Q Do the Libby claimants have to meet the significant
8 occupational exposure requirement like the rest of the
9 plaintiffs do?

10 A No, I don't think they do.

11 Q Did you review the rest of the TDP's medical and exposure
12 criteria for the non-malignant diseases?

13 A Yes, I did.

14 Q Did you find those to be medically reasonable?

15 A Yes, I did.

16 THE COURT: Mr. Finch, I need a clarification. It
17 went by me too fast. I'm sorry, doctor. You said that the
18 Libby claimants do not have to meet the same exposure standards
19 or medical criteria standards? I'm sorry.

20 THE WITNESS: Well, the exposure criteria, but the
21 exposure are part of the TDP criteria, so it's the -- like for
22 lung cancer, they have to have lung cancer, but the exposure
23 criteria don't require that significant occupational exposure.

24 THE COURT: Okay. Thank you.

25 BY MR. FINCH:

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1 Q In your view does the reasonableness of the TDP medical
2 criteria turn on the question of whether there is something
3 different or not about Libby asbestos disease? Would they be
4 reasonable even if it is different?

5 A Right.

6 UNIDENTIFIED ATTORNEY: Sorry. I didn't hear the
7 question.

8 MR. FINCH: Sure.

9 Q Does the reasonableness of the TDP medical criteria turn
10 on the question of whether or not there is a different disease
11 in Libby? I know you've concluded that there isn't. Some
12 people have said there is. In your view is it still medically
13 reasonable one way or the other on that question?

14 A Yes, I think it is medically reasonable on that question,
15 and I do think it would take into account the characteristics
16 that Dr. Whitehouse describes for the Libby pleural disease.
17 If it's progressive --

18 MR. HEBERLING: Objection. The answer is beyond the
19 scope of the question.

20 THE WITNESS: Okay.

21 UNIDENTIFIED ATTORNEY: You don't have to pay
22 attention --

23 MR. FINCH: -- beyond the scope of the question?

24 MR. BERNICK: What? I don't know what he said --

25 MR. FINCH: I don't understand --

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1 MR. BERNICK: -- interrupted the answer.

2 MR. FINCH: I don't understand the objection.

3 THE COURT: The objection was that her answer is
4 going beyond the scope of the question which was whether
5 they're medically reasonable and she was explaining, I think,
6 why she thought they were. But, then she started to go into
7 characteristics about Dr. Whitehouse's reports and diagnoses of
8 his own patients.

9 MR. FINCH: And I didn't hear the rule -- the Court's
10 ruling on the objection.

11 THE COURT: It seems to me that it went a little bit
12 beyond the scope of the question.

13 MR. FINCH: Okay.

14 BY MR. FINCH:

15 Q Where did you stop the permissive part of the answer, and
16 why don't you just --

17 THE COURT: The objection came in the middle. Why
18 don't you just ask another question.

19 MR. FINCH: Okay.

20 Q Could you explain why it is that the reasonableness of the
21 TDP medical criteria for severe disabling pleural disease don't
22 turn on the answer of the question of whether something is
23 different about Libby pleural disease?

24 MR. HEBERLING: Objection, and may I voir dire the
25 witness on this issue?

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1 THE COURT: What's the nature of the objection?

2 MR. HEBERLING: The question has gone to whether the
3 medical criteria are reasonable for Libby, and I don't see
4 foundation for that.

5 MR. FINCH: That's not what I asked. That's not what
6 I asked.

7 MR. HEBERLING: It's two questions ago, and I think
8 it links in here.

9 MR. FINCH: No, that's not the question.

10 THE COURT: That is not the question that's before me
11 now, I think. Restate the question.

12 BY MR. FINCH:

13 Q Regardless of the debate about whether or not pleural
14 disease in Libby is different or not different, in your view,
15 is the TDP medically reasonable?

16 A Yes.

17 MR. FINCH: Your Honor, with that I'm going to pass
18 the witness.

19 THE COURT: Good afternoon.

20 MR. HEBERLING: Good afternoon, Your Honor. Your
21 Honor, we did not have an opportunity this morning to
22 thoroughly confer with the information technology people. We
23 have overheads. We hope that they come up on the screen. If
24 not I have hard copies, as well.

25 THE COURT: All right.

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1 MR. BERNICK: Or you can -- you know, John, just use
2 the ELMO. You can put them right on the plate and they'll work
3 up on the screen.

4 THE COURT: Paper copies would be helpful for me in
5 any event.

6 MR. HEBERLING: May I approach, Your Honor?

7 THE COURT: Yes, please. And maybe for the witness,
8 too. I don't know. Thank you.

9 THE WITNESS: If they're going to show behind me it
10 might be easier to --

11 THE COURT: Well, it will be on your screen, but it
12 still --

13 THE WITNESS: Oh, they're here. Okay.

14 THE COURT: It depends on whether you'd like paper.

15 THE WITNESS: It depends on whether I have to take
16 off my bifocals.

17 CROSS EXAMINATION

18 BY MR. HEBERLING:

19 Q Good afternoon, Dr. Welch.

20 A How are you?

21 Q Good. This Category 4B, severe and disabling pleural
22 disease, has not appeared in other bankruptcies before this
23 one, correct?

24 A That's my understanding, yes.

25 Q And you were consulted by the ACC in the process of

1 creating 4B for Libby, correct?

2 A For the TDP, correct.

3 Q And it was with Libby in mind, correct?

4 A Correct. Although, you know, there are cases of severe
5 disabling pleural disease from Grace exposure among other
6 workers, too. They just haven't been compensated in the
7 previous TDP. It's not a new disease of Libby. It just was
8 not previously compensated.

9 Q And there was a concern from Libby that there is a lot of
10 severe pleural disease that would not be covered and you agreed
11 with that, correct?

12 MR. BERNICK: Objection to the form of the question.
13 Concerned where?

14 THE COURT: All right. Sustained.

15 Q There was a concern from Libby that there was a lot of
16 severe pleural disease and that would not be covered, and you
17 agreed with that, correct?

18 A Not be covered without 4B.

19 Q Right.

20 A Is that what you meant? Because I do think it is covered
21 with 4B, so I just want to make that distinction.

22 Q And in your deposition you said not be covered under the
23 fund, meaning under the funds -- under various funds, prior
24 forms of TDPs, correct?

25

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1 A Right. Without a -- let me say what I think I said then.
2 Without a specific criteria that covers disabling pleural
3 disease, those people couldn't necessarily have claimed under
4 something that required a 21 as the measure of severity on
5 their x-ray previously. So, yes, I agree with that.

6 Q And you agreed that there was a subgroup with significant
7 impairment from pleural disease, correct?

8 MR. BERNICK: Objection to form. Subgroup where?

9 THE COURT: And that's sustained.

10 MR. HEBERLING: Okay.

11 Q Did you testify at your deposition that you agreed that
12 there was a subgroup?

13 MR. BERNICK: Your Honor, it's not a proper use of
14 the deposition. She's said nothing to be impeached. Could you
15 just reformulate the question so it's clear.

16 THE COURT: And that's sustained.

17 Q Do you believe that there's a subgroup of patients who
18 have significant impairment from pleural disease?

19 A Yes. In asbestos-exposed populations everywhere there is
20 a subgroup of people with pleural disease who have significant
21 impairment, yes.

22 Q And in this process of designing 4B, did you obtain any
23 data from the CARD Clinic center for asbestos-related disease
24 clinic in Libby on how a blunting requirement might affect the
25 Libby exposure patients?

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1 A Well, I understand -- I'm fairly sure that Dr. Whitehouse
2 testified on that. I know his opinion is that it would
3 exclude --

4 MR. BERNICK: Let the witness be cautioned.

5 THE WITNESS: Sorry. I don't know that I --

6 MR. HEBERLING: Objection to counsel's interruption.

7 MR. BERNICK: Well, no, I --

8 THE WITNESS: Let me go back and answer the question.

9 MR. BERNICK: The witness was going beyond the scope
10 of what was being asked.

11 THE COURT: The witness, I think, was attempting to
12 explain the answer to the question. I think the question is
13 whether you got information from the CARD Clinic as to how the
14 blunting requirement would affect the population in Libby who
15 would qualify otherwise for 4B treatment, is that what you're
16 asking?

17 MR. HEBERLING: That's exactly it, yes.

18 A I didn't review individual files for that specific
19 purpose, but I have seen something either in something to that
20 affect in Dr. Whitehouse's testimony. But, I haven't -- I
21 didn't look at the individual files and analyze them to answer
22 that specific question.

23 Q And did you see that in Dr. Whitehouse's testimony before
24 or after you began the process of designing 4B?

25 A Well, since I think your question was would they be

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1 excluded by 4B, I think it was after. Didn't you ask me that
2 there would be individuals excluded by 4B?

3 Q Yes, and in the process of designing 4B did you obtain
4 data from the CARD Clinic?

5 A I didn't analyze data from the CARD Clinic specifically in
6 designing 4B.

7 Q And in the process of designing 4B did you obtain any data
8 from the CARD Clinic on how the three millimeter requirements
9 for thickness of pleural thickening and the 25 percent extent
10 of chest wall requirement would affect Libby exposure patients?

11 A I did not do that analysis. And I'm aware that Dr. Wild
12 did a very nice analysis of the --

13 MR. HEBERLING: Objection. Beyond the scope of the
14 question. Motion to strike the answer.

15 THE COURT: No. I think she said she didn't do it.
16 She said who did. To the extent that she's expressing her
17 evaluation of someone else's work, that's stricken.

18 Q So, this process of designing 4B set requirements without
19 specific information on how they would affect Libby --

20 MR. BERNICK: Objection to the form of the question.
21 It's ambiguous.

22 THE COURT: Sustained.

23 Q In designing the Category 4B, did you have specific
24 information, numbers or any kind of -- did you do any kind of
25 study on how these requirements in 4B, namely -- okay, and

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1 we're talking about the blunting, the three millimeters and the
2 25 percent extent of the chest wall, how they would affect
3 Libby patients?

4 A Really, I think what you're asking is, which Libby
5 patients would get an expedited review and which would get
6 individual review. Your question seems to imply that they
7 would be excluded, but they wouldn't -- they're not excluded
8 from individual review if they don't meet the expedited
9 criteria.

10 Q The question is directed at the expedited review, so would
11 you kindly answer it in that vein?

12 MR. BERNICK: What's the question?

13 MR. HEBERLING: I object to counsel interjecting
14 questions into --

15 THE COURT: That's sustained.

16 A But, could you ask me the question again?

17 Q Yes, I will. In this process of setting the 4B
18 requirements, did you obtain specific information on how the
19 expedited review requirements for blunting, three
20 millimeters, 25 percent extent would affect Libby patients?

21 A I didn't do that analysis. I didn't see what proportion
22 would meet expedited review or have to do individual review.
23 No, I did not do that analysis.

24 Q Did you consult with doctors at the CARD Clinic regarding
25 these criteria for 4B severe pleural disease expedited review?

1 A No, I did not.

2 Q And you accepted the fact of severe pleural disease in
3 Libby, correct?

4 A I do know that there are cases that I would -- that meet
5 the criteria for diffuse pleural thickening. I've seen records
6 on individuals. And I would presume based on what I know about
7 asbestos, most populations, there would be some. Is that
8 responsive?

9 Q Now, the TDPs allow Libby claims based on a six-month
10 residency in Lincoln County, correct?

11 A I don't want to quote that specific exposure requirements.
12 I know six months, it's -- my understanding is that six months
13 of exposure to Grace products and Libby. And whether that's
14 defined in Lincoln County, I don't know specifically.

15 Q Okay. Close enough. And you mentioned a Helsinki report,
16 and there they used 25 fiber years as a minimum for development
17 of asbestosis, correct?

18 A Used it for what purpose?

19 Q As a threshold or a benchmark for asbestosis cases?

20 A No, they don't.

21 Q Could you explain what the 25 fiber years and asbestosis
22 cases in terms of the Helsinki criteria may be?

23 A You want me to explain how in that Helsinki document they
24 used the term 25 fiber years?

25 Q Yes.

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1 A I'd rather look at the document rather than try to state
2 it from memory.

3 MR. HEBERLING: Okay. Can we have PP-165 up?

4 Q Now, that would be Exhibit 1 your deposition.

5 A Oh, okay. Great. Because I was kind of hoping I had a
6 copy. Exhibit 1 is my report.

7 Q And that should be your report for December '08?

8 A March 2009.

9 Q Okay. Then please look at Exhibit 2.

10 A Okay. Exhibit 2 is December 2008.

11 Q Okay. Then six lines up from the bottom. Do you see
12 where your report says, "This report, referring back to the
13 Helsinki report, concluded that the exposures described were
14 estimated to represent accumulative exposure" --

15 A Can I stop you a second. I don't know what page you're
16 on.

17 Q Six. Sorry.

18 A Page 6, Exhibit 2. Okay.

19 Q Okay. Six lines up from the bottom. I'll start again.

20 A Okay. I see where you are now. Mm-mm.

21 Q Your report says, "This report, referring back to the
22 Helsinki report, concluded that the exposures described were
23 estimated to represent accumulative exposure of 25 fiber years
24 and that clinical cases of asbestosis occur at similar
25 accumulative exposure levels," right?

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1 A Okay.

2 Q Okay. So, that -- do you see -- do you consider that a
3 benchmark of 25 fiber years for development of asbestosis? Or
4 what would you call that?

5 A The discussion there of 25 fiber years is part of the
6 discussion of attribution of lung cancer to asbestos exposure.
7 It's -- they're not -- the Helsinki group didn't make a fiber
8 year requirement for diagnosis of asbestosis at all. They're
9 using that as a benchmark if you were to look -- compensate
10 lung cancer in the absence of a non-malignant disease on x-ray.

11 Q Then in the last phrase you say, "Clinical cases of
12 asbestosis occur at similar accumulative exposure levels." Do
13 you see that?

14 A Correct.

15 Q Is that your statement or Helsinki's report?

16 A I'm paraphrasing the Helsinki report.

17 Q Okay. So, would you agree it would be hard to achieve 25
18 fiber years total exposure in just six months?

19 MR. BERNICK: Objection to the form of the question
20 and foundation.

21 A No. It's not hard to achieve 25 fiber years in six
22 months.

23 Q You'd have to have 50 fiber years of exposure, correct?
24 Excuse me. A 50 fiber year rate of exposure for six months,
25 right?

1 A Right. Fifty fibers per cc would be the appropriate
2 measurement for six months. And there are many occupations
3 where people get that kind of exposure historically, so it's
4 not -- you can achieve 25 fiber years in six months.

5 Q And six months is the residency requirement for Libby
6 exposure, is it not?

7 A Yes. I wasn't answering your question in six months in
8 Libby. You didn't say six months in Libby, so maybe I
9 misunderstood. Do you want to -- are we getting confused?

10 Q So, let's say at an illegal work site, if we're -- with a
11 one fiber per cc exposure for workers, it would take 25 years
12 exposure to have 25 years -- total fiber years, correct?

13 MR. FINCH: Objection. Relevance, Your Honor. The
14 TDP doesn't have anywhere in it, for Libby or outside of Libby,
15 a fiber year requirement. It has a -- for Libby it's six
16 months living in Lincoln County, and outside of Libby it has
17 the significant occupational exposure which is not defined in
18 terms of fiber years a for certain of the non-malignant
19 categories and the asbestos-related lung cancer. So, I don't
20 see the relevance at all of the hypothetical questions about
21 fiber year exposure.

22 MR. HEBERLING: Your Honor, this goes to the issue of
23 Libby being different. The exposure at this illegal work site
24 that I had posed would be ten times the OSHA standard. And
25 yet, it would take 25 years under those conditions to get to

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1 the threshold for asbestosis, and yet the category for Libby
2 allows just six months residency, breathing the air in Libby.
3 That's an indication through the witness' testimony that the
4 exposures in Libby are to a very toxic form of asbestos.

5 THE WITNESS: May I raise my hand?

6 MR. BERNICK: Your Honor, that is an opinion -- hold
7 on. No, no. I have an objection.

8 THE WITNESS: Was that a question you posed to me?

9 MR. BERNICK: I have an objection.

10 THE COURT: I'm sorry. It's a response to an
11 objection. I don't think there is anything in the witness'
12 testimony so far that can assume toxicity based on exposure
13 over that particular time frame. And you're going to have to
14 link it up a lot more clearly than this for me to make that
15 kind of a leap. I think what the TDP does is explain that
16 Libby residents will qualify for that category of treatment if
17 they have resided in Lincoln County for six months. It doesn't
18 have anything to do with toxicity, it gives them a break. They
19 only have to --

20 UNIDENTIFIED ATTORNEY: That's exactly right.

21 THE COURT: -- say I've lived here for six months,
22 and therefore I now am going to qualify for treatment under
23 this category. I can't -- I've lost the relevance. I think
24 there's a misunderstanding as to what the TDP does.

25 MR. LOCKWOOD: Your Honor, if Mr. Heberling is

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1 suggesting that we should make Libby exposure requirements more
2 stringent like a year or five years, I suppose we could --

3 THE COURT: Mr. Lockwood. All right. That's enough.
4 Okay. The objection is sustained. I think that's a
5 misunderstanding of the TDP. If you want to get from the
6 witness the understandings of TDP to make sure that there isn't
7 something relevant, you know, please pursue that.

8 BY MR. HEBERLING:

9 Q Six month exposure requirement applies to Libby, Lincoln
10 County, and nowhere else, correct?

11 A That's my understanding, yes.

12 Q Are you aware that there are individuals in Libby with
13 only six months residency who have asbestos disease?

14 A I haven't looked at the individual cases to know whether
15 they're -- no, I don't know that for a fact.

16 Q Are you aware that Libby has a different form of asbestos
17 than elsewhere in the United States?

18 A No, that's not true.

19 Q And are you aware that Libby asbestos is winchite largely?

20 A Some of the Libby asbestos is winchite. Some is
21 Tremolite. Tremolite's through the United States --

22 Q Isn't it about 84 percent winchite?

23 A I don't know the numbers. Winchite -- richtrite
24 (phonetic) --

25 Q Those are all rare forms of asbestos, are they not?

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1 A They're actually not defined as forms of asbestos.
2 They're asbestos-like materials, but when you look at the OSHA
3 definition of asbestos I think they're not included.

4 Q And they're asbestos formed materials nevertheless,
5 correct?

6 A Correct.

7 Q And are you familiar with Meeker 2003 which reviews this?

8 MR. BERNICK: Your Honor, this goes beyond scope.
9 She's not a geologist. Mr. -- Dr. Meeker was -- is.

10 THE COURT: It's proper. The witness can answer it.
11 If she knows, she knows.

12 Q You may answer.

13 A I know I've seen Dr. Meeker's paper, but I don't remember
14 the details. It wasn't part of my opinions in this TDP.

15 Q Can you tell us of any other community cohort in the
16 United States exposed to winchite asbestos in a significant way
17 which has received the attention in the medical literature?

18 THE COURT: I need to interrupt. I'm sorry. I
19 thought the witness said that winchite is not included in the
20 definitions -- standard definitions of asbestos. That it's
21 asbestos form.

22 MR. HEBERLING: She is agreed that it is asbestos
23 form.

24 THE COURT: Right.

25 MR. HEBERLING: And as --

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1 THE COURT: I think you need to restate your question
2 then.

3 BY MR. HEBERLING:

4 Q Are you aware of any other communities which have
5 widespread exposure to winchite asbestos in the United States?

6 A Well, the -- I think as we mentioned before, the Libby
7 vermiculite was shipped all across the country to expansion
8 plants. And the same materials that were present in the Libby
9 mines and the Libby community were sent to those 200 plants,
10 and there's community exposure at those plants. And some of
11 which has been studied in the ATSDR documents, and the workers
12 have been studied through ATSDR study. So, there are
13 communities impacted by the same material. It's not restricted
14 to Libby, Montana.

15 Q And you would expect the same patterns of pleural disease
16 in the people thus exposed as in the people in Libby as well,
17 correct?

18 A In the one published study looking at expansion plant
19 populations, it was a similar proportion of people with pleural
20 disease as in the Libby ATSDR study.

21 Q Okay. Let's --

22 UNIDENTIFIED ATTORNEY: (Indiscernible).

23 THE COURT: Do you have the portable? I don't think
24 it's turned on. I'm sorry. You probably -- that's better.
25 Thank you.

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1 (Pause)

2 UNIDENTIFIED ATTORNEY: Just use the ELMO. It might
3 be a lot easier.

4 UNIDENTIFIED ATTORNEY: There you go. It's right
5 up --

6 THE COURT: Just a minute. It's not on yet.
7 She's -- okay. Thank you.

8 MR. BERNICK: I do have an objection because I
9 specifically had a conference with counsel about the numbers
10 that appear in the right column. It was represented to me that
11 they would not be displayed and not be used with this witness
12 on this stand. And that's exactly what was said to me by
13 counsel for Libby.

14 MR. HEBERLING: (Indiscernible).

15 MR. BERNICK: Oh. Oh, I see, so -- I guess I got --
16 I wasn't careful enough in my words.

17 THE COURT: All right. For now -- counsel's agreed
18 he's only using the middle section, so that's all we'll talk
19 about. Go ahead.

20 UNIDENTIFIED SPEAKER: (Indiscernible).

21 THE COURT: Unfortunately, you're going to have to
22 speak directly into that I'm afraid. It's on. He just had it
23 down (indiscernible).

24 THE CLERK: Sir, it's not picking up. I don't know
25 why it's not picking up.

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1 THE COURT: Jan, do you have a lavalier mic?

2 THE CLERK: He has it right here.

3 THE COURT: For tomorrow, could you get a couple in
4 here, please?

5 UNIDENTIFIED ATTORNEY: You have to turn it on, too.
6 The little green thing or the little flip.

7 MR. HEBERLING: Got it. Okay. Perhaps this'll work.

8 THE COURT: Okay.

9 BY MR. HEBERLING:

10 Q Okay. So, we have the initial diagnosis at the top. And
11 then do you see blunting here?

12 A Can I stop to ask you questions as you go down or do you
13 want me to just --

14 Q I'll ask the questions.

15 A Okay. Go ahead.

16 Q Okay. Do you see the initial diagnosis of diffuse pleural
17 thickening up at the top?

18 A Okay.

19 Q And then the -- one of the chest x-ray criteria that you
20 discussed was blunting, correct?

21 A Correct. Blunting the costophrenic angle, correct.

22 Q Okay. And if the person has no blunting of the
23 costophrenic angle, he's out of 4B, correct?

24 A He would have to go to individual review.

25 Q Then there's a three millimeter thickness requirement for

1 the pleural thickening or --

2 A Correct.

3 Q -- expedited review, correct?

4 A Correct.

5 Q And if they don't have that they're out of 4B, correct?

6 A Again, individual review. If they -- you know, if they
7 otherwise meet their criteria.

8 Q Then the next item is over 25 percent of extent of chest
9 wall? That's another chest x-ray reading --

10 A Correct. Another criteria in the TDP. That's correct.

11 Q And if they don't have that they go out, right? Out of
12 4B?

13 A To individual review.

14 Q Okay. Then in the lower section we have lung function
15 test levels that need to be met, correct?

16 A Correct.

17 Q So, if a person has total lung capacity under 65 and all
18 the other criterias, that person would go to 4B compensation,
19 correct?

20 A Correct.

21 Q And if they have a forced vital capacity under 65, they
22 don't go straight to compensation. They have to meet another
23 criteria which is the having the ratio, the obstructive disease
24 issue, or FEV1/FEC over 65, correct?

25 A Correct.

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1 Q And if not they go out?

2 A For individual review.

3 Q Okay. Thank you.

4 THE COURT: I just want the record to be clear. Dr.,
5 when you're saying -- the question is, they go out. And your
6 answer is, they go to individual review. I think what you're
7 saying is they stay in Category -- they can stay in Category
8 4B, but it's an individual review as opposed to an automatic
9 payment because you've met the criteria.

10 THE WITNESS: Correct.

11 THE COURT: Okay. Thank you.

12 THE WITNESS: Correct. If they have impairment and
13 they have -- and they want to make a claim that they have this
14 diffuse pleural thickening but they don't meet those specific
15 points, then they can apply under individual review.

16 THE COURT: All right. Thank you.

17 Q And, Dr. Welch, you discussed the ATS 2004 diagnostic
18 criteria during your direct examination. Do you recall that?

19 A Yes.

20 Q That's American Thoracic Society standards?

21 A Correct.

22 Q Now, the definition for diffuse pleural thickening in the
23 American Thoracic Society diagnostic criteria does not include
24 the three millimeter thickness requirement, does it?

25 A I don't specifically recall if it does or not. I

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1 don't -- yes, actually, let me look at it because I have it in
2 one of these books.

3 (Pause)

4 A I mean the basic criteria that the ATS uses is evidence of
5 structural pathology consistent with asbestos-related disease.
6 And that could be on chest x-ray or a CT scan. Evidence of
7 causation by asbestos is documented by exposure, other
8 characteristics, then excludes other plausible findings. So,
9 for diagnosis of any non-malignant asbestos-related disease
10 they do -- they don't require using the ILO classification,
11 specifically the way we do in the TDP.

12 Q And so, the three millimeter thickness requirement is not
13 a requirement for a diagnosis of asbestos-related disease under
14 the ATS 2004 publication, correct?

15 A That's correct. And as I said before, the expedited
16 review won't include everybody.

17 Q Likewise, the ATS 2004 diagnostic criteria standard
18 definition for the diagnosis of asbestos disease does not
19 include the 25 percent or more coverage of the chest wall,
20 correct?

21 A I just want to look at the plaque section and see.

22 (Pause)

23 A It doesn't refer specifically to 25 percent.

24 Q So, the three millimeter and the 25 percent extent of the
25 chest wall requirements are apart from the standard diagnosis,

1 correct?

2 MR. BERNICK: Objection to the form of the question.

3 THE COURT: What's wrong --

4 MR. BERNICK: The questions were about the ATS
5 guidelines. Now the more general question is -- and there
6 hasn't even been foundation to establish what those
7 standards -- where those standards are derived from.

8 MR. HEBERLING: I'll rephrase the question.

9 BY MR. HEBERLING:

10 Q The -- so the three millimeter thickness requirement and
11 the 25 percent extent of chest wall requirements are not a part
12 of the standard diagnosis stated in the ATS 2004 publication,
13 correct?

14 A That's correct.

15 Q And nor are the three millimeter thickness and 25 percent
16 extent requirements measures of severity of asbestos lung
17 disease?

18 A No. Yes, they're not intended as measures of severity.

19 Q So, given these additional requirements of three
20 millimeters thickness and 25 percent extent, you know that
21 there are going to be a certain percentage of people who do
22 have severe disease who are not going to qualify under the
23 successive presumptions they have to meet under the medical
24 criteria, correct?

25 A No.

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1 MR. BERNICK: Objection. Lack of foundation.

2 Assumes a fact that's not been established.

3 THE COURT: That's sustained.

4 Q Given that the criteria of three millimeters thickness and
5 25 percent extent are added on to the normal diagnostic
6 requirements for asbestos disease, isn't it true that there's a
7 certain -- do you then know that there's going to be a certain
8 number of people who do have severe disease who are not going
9 to qualify under Level 4B?

10 MR. BERNICK: Your Honor, I would not object to the
11 question if the prefatory statement is eliminated. It just
12 asks question. I don't know what he means by normal. It's not
13 been established through this witness. Just ask the question
14 and it'll be fine.

15 THE COURT: Sustained.

16 Q Is it correct that when you set your assumptions as high
17 as they are you get a high degree of certainty, but you also
18 know there is going to be a certain percentage of people who do
19 have severe pleural disease who are not going to qualify under
20 the excessive presumptions they have to meet?

21 A I do agree with the general statement that I do think
22 there will be people who have severe pleural disease who can't
23 meet the expedited review, and they would go to individual
24 review. I'm not so sure I would say that the criteria are a
25 high bar that we've set. I mean, three millimeters is what the

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1 ILO requires if you say there's pleural thickening present.
2 That's their minimum requirement for pleural thickening. But,
3 I think your question went to the fact, well, will there be
4 people who can't meet expedited review and they have to go to
5 individual review with severe pleural disease. That's likely.

6 Q And the ILO system is a system of classifications, is it
7 not?

8 A Yes. That's what it's for. It's for standard
9 classification of chest x-rays.

10 Q And it's not designed for clinical diagnosis of asbestos
11 disease, correct?

12 A Not specifically, no, it's not.

13 Q And so, there may be individuals who have significant
14 diffuse pleural thickening, but who do not meet the criteria
15 set by the ILO classification, correct?

16 MR. BERNICK: Objection to the form of the question.

17 THE COURT: Overruled. She can answer.

18 A Can you tell me what you mean by significant pleural
19 thickening?

20 A Well, I just read you a sentence from your report. What
21 did you mean by significant pleural thickening?

22 THE COURT: I'm sorry. You asked her a question. I
23 don't know that you read her statement that she would recognize
24 in that form.

25 A Thanks. Yes. I knew you were reading from something when

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1 you asked me that question. And I kind of paraphrased your
2 question, but I didn't know where you were reading it from.

3 Q Please refer to your report of March '09. This is PP-200,
4 Page 19.

5 A Okay.

6 Q Do you see at the top where you're saying, "There may be
7 individuals who have significant diffuse pleural thickening,
8 but do not meet the criteria set by the ILO classification"?

9 A Correct.

10 Q What did you mean by significant diffuse pleural
11 thickening at that -- in that statement?

12 A Well, I'm really talking about the context of the TDP, and
13 there could be people who otherwise would meet the criteria for
14 4B, but might not meet those specific ILO criteria. And those
15 were the people who would go to expedited review.

16 Q And under individual review were a --

17 A Individual review. Sorry. I said expedite. I meant
18 individual. Thanks.

19 Q I understood that. Where a claimant, for example, has
20 only two millimeters thickness, but the lung is encased and he
21 has severe lung function loss, and yet is out of Category 4B,
22 he can go to individual review, right?

23 A Correct.

24 Q Okay. And for the individual review process, have you
25 stated that you believe a physician review is not necessary?

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1 A The trust will establish their individual review process.
2 I'm not setting that up for the trust.

3 Q And in your opinion physician review is not necessary,
4 correct?

5 MR. BERNICK: Objection. Goes beyond the scope of
6 the examination. And it's irrelevant.

7 THE COURT: It does seem to go beyond the scope of
8 the examination. What is the relevance?

9 MR. HEBERLING: Well, Your Honor, they discussed
10 individual review in some detail --

11 THE COURT: Yes.

12 MR. HEBERLING: -- and I'm asking the witness whether
13 she thinks physician review should be --

14 MR. BERNICK: It is irrelevant because the witness
15 has just testified, and I think it is undisputed, that these
16 matters will be set up by the trustees. So, she's kind of
17 being asked to give an advisory opinion about how the trustees
18 should do their work.

19 THE COURT: If you're asking whether the TDP requires
20 it, I think the witness may be in the capacity to the answer.
21 But, the trust hasn't been established yet. I don't know that
22 the witness could opine as to what the requirements will be in
23 that capacity.

24 MR. HEBERLING: Well, I'll ask a couple questions and
25 we'll see where we go.

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1 THE COURT: All right.

2 BY MR. HEBERLING:

3 Q So, is it your understanding that the TDP requires a
4 physician review in connection with the individual review?

5 A I don't think that that's specified in the TDP.

6 Q In your opinion, should there be?

7 MR. BERNICK: That's the same problem.

8 UNIDENTIFIED ATTORNEY: Objection. It's the same
9 problem.

10 THE COURT: She's been qualified as an expert to
11 opine as to what is medically reasonable. I'm missing why this
12 isn't appropriate for cross examination.

13 MR. BERNICK: Because it's not a question of scope,
14 it's a question of relevance, and not a question for
15 qualifications. It's relevance. What the trust does when the
16 trust is set up is whatever it is. She is not offering
17 opinions as to what standard -- never has on direct or in the
18 reports -- what standard should be applied by the trust when it
19 comes to individual review.

20 THE COURT: Yes, you're correct. The objection's
21 sustained.

22 Q Do you know if there are any medical guidelines provided
23 in the TDPs for this individual review on questions of two
24 millimeters or obstructive disease or any such medical issue?

25 A As I said before, it's my understanding that the process

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1 for individual review has not been established yet. So, such
2 guidance -- to my knowledge it doesn't exist yet.

3 Q And you've never performed or participated in individual
4 review for an asbestos trust, correct?

5 A That's correct.

6 Q And you have never seen an individual review report?

7 A Not to my knowledge. Not to my recollection.

8 Q And as to CT scans, is it correct that you did not
9 consider that the TDP allows for use of CT scans to measure the
10 three millimeters thickness or the 25 percent extent of chest
11 wall?

12 MR. FINCH: Object to form.

13 THE COURT: Is it her understanding what the TDP
14 states?

15 MR. LOCKWOOD: He's not distinguishing between an
16 expedited review and the individual review in the TDP, Your
17 Honor.

18 THE COURT: All right. Sustained.

19 MR. HEBERLING: Well, there's nothing in the
20 individual review, so -- I will include the words expedited
21 review --

22 THE COURT: All right.

23 MR. HEBERLING: -- but -- okay.

24 Q So, as to CT scans, is it correct that -- strike that. As
25 to CT scans, is it your understanding that under expedited

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1 review you do not consider that the TDP allows for use of CT
2 scans to measure the three millimeter sickness or the 25
3 percent extent of chest wall?

4 A The expedited TDP is based on a chest x-ray not on a CT
5 scan.

6 Q And do you consider that CT scans may be used in the
7 diagnosis of diffuse pleural thickening for Level 4B expedited?

8 A Not for expedited, but individual, because the expedited
9 is based on a chest x-ray, and so if a CT is being used for
10 part of the demonstration to meet the criteria, it would be on
11 individual review. That's my understanding.

12 Q Then, the ATS 2004 document, Page 696, you may want to
13 look at this, but I'll read the quote, and see where we go. It
14 says only 50 to 80 percent of cases of documented pleural
15 thickening demonstrated by autopsy, CT, or HRCT are detected by
16 chest radiograph. Do you agree with that?

17 A I don't know about the exact number, but there are plenty
18 of studies that show you find more pleural scarring when you do
19 a CT scan than on a plain chest film. That is correct.

20 Q And HRCT, one sees 40 to 50 percent more pleural
21 thickening, correct?

22 A That's a reasonable estimate. I mean, I think you can get
23 -- I've seen that number. You find about twice as much pleural
24 thickening of any kind, small pleural plaques. Not necessarily
25 -- people haven't done that study to look at costophrenic angle

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1 obliteration, for example. Do you find that on HRCT versus
2 chest x-ray more? That's certainly not in that twice as much
3 category, but I can't give you a number.

4 Q And back to the poster here. CT scans are not used for
5 any of the criteria for 4B, correct?

6 A For expedited review it's based on classification of a
7 chest x-ray, not on CT scans, so they're not used for expedited
8 review, but I think as I said, if that's the basis for
9 diagnosing severe pleural disease, that can go on individual
10 review.

11 MR. HEBERLING: Objection to the -- the answer is
12 exceeding the scope of the question.

13 THE COURT: No. Actually it's not.

14 MR. HEBERLING: We're into individual review again.

15 THE COURT: She was explaining the answer. She said
16 that it was not there for expedited, but can be used for
17 individual.

18 MR. HEBERLING: Okay.

19 THE COURT: I think that's within the scope. But it
20 has been gone over at least ten times now. We could move to a
21 new area.

22 BY MR. HEBERLING:

23 Q Let's move on to DLCO, and on the poster we have DLCO has
24 -- with a dotted line around it, and you've testified that
25 that's not used as a basis for severity of lung function loss,

1 correct?

2 A In the expedited review it's not. It could be used in the
3 individual review.

4 Q Okay. And the ATS 2004 diagnostic criteria document, Page
5 697, states evaluation of subjects with suspected asbestos-
6 related disease should include spirometry, all lung volumes,
7 and carbon monoxide diffusing capacity. Do you agree with
8 that?

9 A Sure.

10 Q So, ATS 2004 recommends DLCO for evaluation of asbestos
11 disease?

12 A Sure. That's appropriate.

13 Q And are you familiar with the AMA guides to permanent
14 impairment?

15 A Yes.

16 Q And those are used all across the nation in workers'
17 compensation cases for evaluation of impairment?

18 A Yes.

19 Q And they also use DLCO as a measure or an indicator of
20 severity, correct?

21 A Yes. Sure. If you're not trying to differentiate one
22 kind of lung disease from another it's a good measure of
23 impairment.

24 Q And you, yourself, do not operate equipment, or know how
25 regarding the equipment to do lung volume tests, for example?

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1 A You probably have to be more specific --

2 MR. FINCH: Objection. Relevance. Usually a lab
3 tech does that, Your Honor.

4 THE COURT: She can answer whether she does it or
5 not. Overruled.

6 A I mean -- I'll make you ask me another question, because
7 spirometry measures lung volumes. I routinely do spirometry.
8 I'm trained to do spirometry. Did you want to exclude
9 spirometry from your question?

10 Q I'm asking you about measurement of lung volumes.

11 A Spirometry measures lung volumes.

12 Q Can you operate the equipment to do the lung function
13 tests to measure total lung capacity?

14 A I don't do that.

15 Q Do you do the tests to measure diffusing capacity?

16 A No.

17 Q And is it fair to say you defer to a pulmonologist on
18 those?

19 A Usually the -- a laboratory that does it, it's either a
20 pulmonary physician's office or a hospital based lab under the
21 supervision of a pulmonary doctor. But I can interpret them
22 myself even if I don't do the tests.

23 Q And are you familiar with the Lee, et al. 2003 article
24 which we discussed at your deposition briefly?

25 A It would help if you tell me the title, or what the

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1 subject is.

2 Q Okay. Let's bring up PP -- or, let's see, LC 232.

3 A Is that an exhibit that I have in front of me, too, or --

4 Q I can get -- I need the box.

5 (Pause)

6 A You may not need to give me it. It depends on how much
7 you're going to ask me about it.

8 Q Well, you wanted to know the title.

9 A Okay.

10 Q LC 232. Can I have a -- Volume 2?

11 (Pause)

12 A I remember which article you're talking about.

13 Q What is the title of that article?

14 A It is entitled "Radiographic ILO Readings Predict Arterial
15 Oxygen Desaturation During Exercise in Subjects With
16 Asbestosis."

17 Q And at Page 2005 -- or, 205, toward the bottom left hand
18 column, I believe, it says, "In our study pleural thickening
19 was --"

20 THE COURT: I'm sorry. I can't hear you.

21 Q It says, "In our study pleural thickening was associated
22 with reduced lung volumes and DLCO as has been shown by
23 others." Do you have that?

24 A Yes, I do.

25 Q And I take it you disagree with that?

1 A Well, I don't disagree with their statement, but I think
2 in my deposition I did point out that this was a group of
3 patients with asbestosis, so those who had pleural thickening
4 also had asbestosis, so you can't conclude that the impact on
5 diffusion capacity is related to the pleural thickening because
6 to do that analysis appropriately you would want to exclude
7 people who have asbestosis. Asbestosis is well recognized to
8 impact diffusion capacity among other lung volume tests. So, I
9 don't think it really goes to the question about the impact of
10 pleural thickening on DLCO.

11 Q And would you look at Page 202?

12 A Okay.

13 Q Table 1. Do you see that the first 13 of the 38 subjects
14 did not have asbestosis?

15 A The -- they state in the methods that they were subjects
16 with asbestosis. So, you pointing out 13 people had a
17 profusion less than 1/0, but that doesn't mean they don't have
18 asbestosis.

19 Q And isn't the standard diagnostic level for asbestosis
20 1/0?

21 A "Asbestosis was diagnosed --" I'm quoting from the paper
22 -- "Asbestosis was diagnosed on the basis of the history of
23 significant asbestos exposure over at least six months,
24 presence of crackles on auscultation, and evidence of
25 interstitial fibrosis on high resolution CT scan of the chest."

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1 So, there were some people included who had asbestosis on CT
2 scan who did not have asbestosis on chest x-ray, which is not
3 surprising that that happens, because you just pointed out that
4 the CT scan is more sensitive in finding asbestos-related lung
5 disease. Everyone in this study had asbestosis.

6 Q And nevertheless the authors concluded that reduced DLCO
7 was associated with pleural thickening, correct?

8 A You read that statement. Let's see if I -- it's at the
9 very end of their discussion. And it says --

10 (Pause)

11 A You read the statement from the article.

12 Q All right. And so, you -- and I believe you continue to
13 disagree with that, correct?

14 A I don't know what it is that I'm disagreeing with.

15 Q The association of pleural thickening --

16 A That they report an association -- okay.

17 Q -- and decline in diffusion capacity.

18 A Okay. That -- there's a statement to that effect in this
19 paper. I'm not disagreeing with that.

20 Q Okay. And likewise, in Cookson, 1983, are you familiar
21 with that one?

22 A Do you have it in here?

23 Q No. That's going to be LC 214. In the abstract. Do you
24 see where it says the ratio of transfer factor to effective
25 alveolar volume correlates directly with the degree of pleural

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1 thickening as alveolar volume fell with the increasing severity
2 of pleural disease.

3 A I see what you're -- you read it correctly.

4 Q Okay. And again, that's a long way of saying that
5 diffusing capacity drop was associated with pleural thickening,
6 correct?

7 A You have to let me read it because if the -- they show a
8 transfer factor to volume changes, it could be the diffusion
9 goes up rather than down because the volume went down. But
10 give me a minute and I'll see if I can --

11 Q Okay.

12 A -- interpret this for you.

13 (Pause)

14 MR. BERNICK: Your Honor, with due respect to the
15 scientific inquiry here, this really doesn't have much
16 relevance at all because the witness, there's no foundation for
17 establishing that the witness believes that DLCO was not
18 included amongst the criteria because it didn't associate with
19 diffuse pleural thickening. That's not the witness's testimony
20 at all. And I would note that we're now over an hour into the
21 cross examination. Can we get an estimate about how much
22 longer the cross is going to go?

23 THE COURT: Do you have an estimate of how long
24 you're going to be?

25 MR. HEBERLING: Say another ten, 15 minutes.

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1 THE COURT: All right. To the extent that that was
2 an objection, it's overruled. This is cross examination.

3 MR. HEBERLING: Okay. Let's move on --

4 THE WITNESS: I don't want to spend time to
5 understand that particular paper.

6 BY MR. HEBERLING:

7 Q So, is it your position generally that DLCO decrease is
8 not associated with diffuse pleural thickening?

9 THE COURT: I'm sorry. Decrease or increase? I --

10 MR. HEBERLING: Decrease.

11 THE COURT: Decrease?

12 MR. HEBERLING: Drop.

13 MR. FINCH: Objection. Mis-characterizes the
14 testimony.

15 THE COURT: It's a direct question.

16 MR. HEBERLING: It's a question.

17 THE COURT: Overruled.

18 A It's my opinion that decrease in -- the severe -- sorry,
19 let me start again. Diffuse pleural thickening, defined the
20 way we defined it in the TDP, generally doesn't cause a
21 reduction in DLCO, but it generally does, and it generally
22 causes restrictive lung disease, primarily, and not an isolated
23 reduction in DLCO.

24 Q As to blunting, I'm showing you Slide 11 from the book you
25 prepared. And you're saying diffuse pleural thickening usually

1 involved blunting of the costophrenic angle, correct?

2 A Right. And the way we've defined it, the way the ILO now
3 defines it, it does involve blunting the costophrenic angle.

4 Q And what did you mean when you said DPT usually involves
5 blunting of the costophrenic angle? Are you speaking
6 physically, or in terms of a definition?

7 A Well, the definition is that it involves blunting the
8 costophrenic angle based on the current ILO and the current
9 ATS. You can find papers that predate that, papers from the
10 1980s, where they include cases of diffuse pleural thickening
11 that don't include blunting the costophrenic angle. I would
12 say the science and the research has evolved to the point
13 where, as I think as I said before, that blunting the
14 costophrenic angle is the best predictor of significant lung
15 function impairment. That's why it's included in the ILO
16 classification.

17 Q Is it your statement that DPT usually involves blunting of
18 the costophrenic angle? Did you make that statement?

19 A Yes, I did, and I don't think it's precise enough, because
20 the way I define DPT it has to have blunting of the
21 costophrenic angle. You can have a lot of pleural scarring,
22 but it's not DPT without blunting of the angle.

23 Q And are you familiar with the McLoud study, 1985?

24 A Right. And that's one of the ones that predates this
25 consensus to define DPT with blunting of the angle.

1 Q And in McLoud isn't it true that about half of the people
2 with diffuse pleural thickening, as determined by tissue
3 samples, did not have blunting of the costophrenic angle?

4 A I sort of feel like your question is a little bit apples
5 and oranges. I mean, the TDP is trying to define the people
6 who have significant impairment from pleural thickening, not
7 just define the people who have pleural thickening. So, when
8 you want to -- there's a lot of people who can have a lot of
9 pleural thickening but no lung function impairment from it, or
10 not dropping down to the level that we've defined as severe for
11 the purpose of the TDP. And the McLoud paper is not looking at
12 that. It's describing cases of a lot of pleural thickening,
13 but it's not looking at the comparison or predictor of lung
14 function impairment.

15 Q Would it be fair to say that in the McLoud study only
16 about half of the 120 that had asbestos-related disease had
17 blunting of the costophrenic angle?

18 A You're probably reading out of my deposition. I don't
19 have the paper in front of me. I don't have the numbers.

20 Q Okay.

21 A I --

22 Q Would you look at your deposition --

23 A All I'm saying it's -- I don't think it's a -- it's not
24 relevant to the TDP because she's not talking about lung
25 function impairment, and it's a 1985 paper. So, she describes

1 a series of cases that she called diffuse pleural thickening.
2 She's using a different definition than what we're using if we
3 use the ILO definition, so it's not apples and oranges -- it is
4 apples and oranges in that way.

5 Q Did you agree with the statement I just read at the time
6 of your deposition?

7 A If you're reading it out of my deposition, I take your
8 word for it that you're reading it correctly. And to agree
9 with it I'd have to look at the paper again because I don't
10 remember off the top of my head the numbers.

11 Q Well, I'm trying not to take too much time with that.

12 A That's okay, because I don't think it -- I'll agree with
13 you.

14 Q Okay. And are you aware that in the Libby CARD Mortality
15 Study about half of the people died without having blunting of
16 the costophrenic angle?

17 MR. BERNICK: Objection. Lack of foundation to ask
18 that question.

19 THE COURT: What's the foundation?

20 Q Have you read Dr. Whitehouse's report on the description
21 of the CARD Mortality Study?

22 A I have.

23 Q And did you see in there that 43 percent or so had no
24 blunting of the costophrenic angle?

25 MR. BERNICK: Objection. That report is not in

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1 Evidence. It's not found -- not established that it's a basis
2 for this witness's testimony, and there is a motion that
3 relates to the CARD Mortality Study for reasons that counsel is
4 very well aware of.

5 THE COURT: It's not in Evidence?

6 MR. HEBERLING: Not yet.

7 THE COURT: Have you substantiated that she has used
8 it as part of her study? Because otherwise I'm not sure where
9 we're going with this.

10 BY MR. HEBERLING:

11 Q And you showed -- or, you discussed the Lilis 1991
12 article, and you showed a diagram with people with blunting on
13 one side and people without blunting on the other. Do you
14 recall that, the step diagram?

15 A Yes.

16 Q And is it correct that also for the people who did not
17 have blunting there was a significant decrease in FVC loss over
18 time?

19 A It's not over time.

20 Q Okay. But there was a significant decrease in FVC loss
21 with increasing pleural index, meaning increasing thickness and
22 extent of pleural thickening?

23 A That's correct. The people who had a lot of pleural
24 disease, even in the absence of costophrenic angle
25 obliteration, had lower lung function than people with a lower

1 value of the index. That's correct.

2 Q And those people would be like the ones who were excluded
3 from Level 4B for lack of blunting, correct?

4 A Right. They would go to expedited review. That group,
5 even the highest group in the Lilis paper, didn't fall into the
6 lung function impairment that's set by 4B. So, even though --
7 as your index goes up your lung function goes down, it's still
8 generally, if I'm remembering the paper they were generally
9 above 70 percent of predicted. But there could be people with
10 very -- a lot of pleural disease absent blunting who do have
11 decreased lung function, and they would do individual review
12 because without the blunting of the angle you have to look at
13 all the other characteristics to determine whether it's the
14 plaque that's causing the decreased lung function or some other
15 condition.

16 Q And you mentioned people with 70 percent of normal lung
17 function, correct --

18 A Correct.

19 Q -- in the group without blunting? So, that would imply
20 that half were above 70 and half were below 70, more or less?

21 MR. BERNICK: Objection. Lack of foundation.

22 A I don't know the number. No, I don't know. It could be
23 that there was one person below and 99 of them were above.

24 Q And still the average is 70?

25 A It could -- that certainly --

Welch - Redirect/Finch

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1 Q If the average is 70, isn't it fair to say that there will
2 probably be a bell curve distribution?

3 A No.

4 Q No?

5 A You can't assume there's a bell shape curve distribution
6 around a number like that.

7 Q Okay. So, you wouldn't imagine that there would be a
8 significant number of people with -- in the group average of 70
9 who had lung functions down at Level 50 or so, which was the --

10 MR. BERNICK: Objection. Objection. Her imagination
11 is not of relevance.

12 THE COURT: That's sustained.

13 THE WITNESS: Though I'm happy to answer his
14 question, if you want to ask it again.

15 MR. HEBERLING: I think I'll end there, Your Honor.
16 Thank you.

17 THE COURT: How long will you be, Mr. Finch?

18 MR. FINCH: Ten minutes, maybe --

19 UNIDENTIFIED ATTORNEY: Five.

20 MR. FINCH: Five to ten minutes.

21 THE COURT: Okay.

22 MR. FINCH: Can I do the redirect now rather --

23 THE COURT: Yes.

24 MR. FINCH: And then the afternoon recess?

25 REDIRECT EXAMINATION

Welch - Redirect/Finch

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1 BY MR. FINCH:

2 Q Dr. Welch, do you still have the McLoud paper in your book
3 in front of you? I think it's Libby Claimants' Exhibit 214.

4 A 214 was Cooks, and I actually never even opened up to
5 McLoud.

6 MR. FINCH: Why don't you just show it. She knows
7 the --

8 UNIDENTIFIED ATTORNEY: Can I have the ELMO?

9 MR. FINCH: I do have the ELMO.

10 Q Okay. This is from the McLoud paper.

11 THE COURT: What's the exhibit?

12 MR. FINCH: 85. Sorry, Your Honor.

13 THE WITNESS: Oh. It's 242 in this book, looking at
14 his index. Yes. And then I can find it.

15 Q Thank you. Do you have the McLoud? Just so we're clear,
16 they're talking about diffuse pleural thickening in asbestos
17 exposed populations?

18 A Right. From McLoud, Woods, Carrington, Epler and Gaensler
19 --

20 Q 1985?

21 A Correct.

22 Q Okay. On Page 11 --

23 UNIDENTIFIED ATTORNEY: Zoom. There we go. More,
24 more, more, more, more. There you go.

25 Q Okay. This refers to the 1980 high/low classification?

1 A Yes, it does.

2 Q How does the 1980 classification differ from the 2000
3 classification for purposes of diffuse pleural thickening?

4 A The 1981 does not require blunting of the costophrenic
5 angle.

6 Q And why did the 2000 ILO require -- make that a
7 requirement?

8 A There's a lot of variation between readers in the use of
9 the classification for diffuse pleural disease. The ILO hadn't
10 provided very much guidance in what was diffuse versus what was
11 circumscribed, so they looked at all the information to see
12 what was important -- one -- is it important to make a
13 distinction between circumscribed and diffuse? If not, they
14 can just give up asking people to do that classification. But
15 it is important to make a distinction, and they added that
16 blunting of the angle to increase the reliability of the
17 classification. So, when people are calling it diffuse,
18 they're identifying the diffuse as the category that we know is
19 clinically significant, and increase reader agreement by adding
20 that criteria.

21 Q In your view has the science and the literature advanced
22 between 1980 and 2000?

23 MR. HEBERLING: Objection. Leading.

24 Q Could you describe the advancement of the science you were
25 talking about in your response to Mr. Heberling's questions

Welch - Redirect/Finch

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1 between the 1980 ILO and the 2000 ILO as it relates to the
2 diffuse pleural thickening definition?

3 A Yes. There have been a number of studies that look at the
4 impact of findings on the chest x-ray on pulmonary function.
5 Lilis was one. I think I mentioned this other one, 2004, by
6 Amley (phonetic). And there are some others that are smaller
7 but consistent that show that it's -- the presence of blunting
8 of the costophrenic angle is the best predictor on x-ray of
9 significant loss of lung function.

10 Q There was some discussion about the ILO guidelines not
11 being in the 2004 ATS document. Do you use the ILO guidelines
12 in clinical practice to describe what is shown on x-rays?

13 A Yes.

14 Q And so, is it fair to say that the ILO is used as one of
15 the tools in making a diagnosis?

16 A Yes.

17 Q Did you design the severe disabling pleural disease
18 category for the purpose of excluding Libby claimants?

19 A No.

20 MR. HEBERLING: Objection. Leading.

21 THE COURT: It's leading.

22 Q What were your goals in designing the severe disabling
23 pleural disease category?

24 A Was to add to the TDP a category for those individuals
25 from Libby, but also from everywhere in the United States, who

Welch - Redirect/Finch

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1 have this specific kind of pleural disease that causes
2 significant lung function impairment. I think as I said before
3 it's a group that was not included in previous TDPs, and I
4 think it should have been. So, we -- I got the chance to add
5 it here.

6 Q Mr. Heberling asked you some questions about reviewing
7 CARD clinic data and data from Libby patients. Do you recall
8 those questions?

9 A Yes.

10 Q Did you review medical records from any claimants anywhere
11 for the purposes of determining what percentage of them would
12 qualify under the expedited review criteria for any disease
13 category?

14 A No.

15 Q Did you, as part of your work in this case, at some point
16 review data from the CARD clinic and x-rays of Libby patients?

17 A Yes.

18 MR. HEBERLING: Objection. Beyond the scope.

19 THE COURT: I'm sorry. It went by so fast I didn't
20 even hear the question. I was still thinking about the last
21 answer. Mr. Finch, you're going in such a rapid fire. The
22 witness can keep up with you, but I can't. So --

23 MR. FINCH: Okay. I'm sorry, Your Honor. I'll slow
24 down.

25 Q Mr. Heberling asked you some questions about did you

1 review data from the CARD clinic or x-rays of Libby patients?

2 A Right. I remember that.

3 Q Okay. He didn't ask you at any point in time did you ever
4 review that material?

5 A I did look at x-rays and medical records of patients from
6 the CARD clinic.

7 Q Okay. And you reviewed Dr. Whitehouse's reports, too; is
8 that correct?

9 A That's correct.

10 Q Notwithstanding that, do you still believe that the
11 medical and exposure criteria for severe disabling pleural
12 disease are reasonable?

13 A Yes, I do.

14 Q Does the reasonableness of the TDP depend, in your view,
15 on the type of fiber that people are exposed to?

16 A No, it doesn't.

17 Q Did -- Mr. Heberling showed you this chart.

18 A Do you want to make it --

19 Q Yes. He'll get around to it.

20 A -- bigger -- smaller.

21 Q There you go.

22 (Pause)

23 Q I'm going to write asbestosis 2/1. Why, in your view, is
24 it reasonable to have additional requirements for severe
25 asbestosis and severe pleural disease beyond just a diagnosis

1 of asbestosis or a diagnosis of some kind of pleural disease,
2 whereas there is nothing beyond a diagnosis of mesothelioma in
3 the TDP?

4 A Mesothelioma, one, it's always caused by asbestos, and
5 two, it kills you. Asbestosis and asbestos-related pleural
6 disease, once you know it's asbestosis or asbestos-related
7 disease it's caused by asbestos, but it can be caused by
8 something else. Interstitial fibrosis can be caused by
9 something else. Pleural scarring can be caused by something
10 else. So, you don't necessarily have the certainty you have
11 with mesothelioma that is asbestos-related, on one hand. And
12 then, most people with non-malignant asbestos-related disease
13 die of something else. There's a whole range of severities.
14 So, this category, Category 4, both asbestosis and disabling
15 pleural disease, is designed for the relatively small subset of
16 people with non-malignant disease who have a significant impact
17 from it. They're not necessarily going to die from it, but
18 it's a significant impact on their life. Did that answer your
19 question?

20 Q Yes, ma'am.

21 MR. FINCH: With that, Your Honor, I have no further
22 redirect.

23 THE COURT: Recross?

24 MR. HEBERLING: Just briefly, Your Honor. Can I use
25 that?

Welch - Recross/Finch

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1 MR. FINCH: Sure.

2 MR. HEBERLING: Thank you.

3 MR. FINCH: Do you need this?

4 MR. HEBERLING: No.

5 MR. FINCH: Take it away.

6 (Pause)

7 RECROSS EXAMINATION

8 BY MR. HEBERLING:

9 Q Okay. I believe you just testified that in the case of
10 mesothelioma there's a diagnosis, and no further hurdles, no
11 further requirements, they can go straight to compensation
12 because it's -- the level of certainty is fairly high, right?

13 A Right. I mean, it does require Grace exposure to get
14 compensated --

15 Q Yes. These are the medical criteria --

16 A -- in this TDP.

17 Q -- you understand? Not the exposure criteria?

18 A Okay.

19 Q And for 4B, severe and disabling pleural disease, in order
20 to determine that it's severe we have the lung function
21 requirements down in the lower section?

22 A Right.

23 Q So, in order to make a decision on whether it's severe you
24 would need some kind of lung function level that would have to
25 be met, correct?

1 A Right.

2 Q But the other requirements, particularly this 25 percent
3 and the three millimeter sickness are not part of the
4 diagnosis, are they?

5 A Well, they --

6 MR. BERNICK: Objection.

7 A -- yes, they are.

8 MR. BERNICK: Not part of the diagnosis of what?

9 Q They're not part of the ATS 2004 diagnostic criteria --

10 MR. BERNICK: That's --

11 Q -- for the diagnosis of asbestos disease, correct?

12 MR. BERNICK: That's repetitive of his cross
13 examination almost verbatim.

14 THE COURT: It is repetitive. If you're going to
15 make another point, go ahead, but she's already testified to
16 this.

17 MR. HEBERLING: That's my point. Thank you.

18 THE COURT: Mr. Finch, anything more?

19 MR. FINCH: No re-redirect, or whatever it is.

20 THE COURT: All right. You're excused, Dr. Welch.
21 Thank you. We'll take a ten minute recess.

22 MR. FINCH: Thank you, Your Honor.

23 MR. BERNICK: As a process point, Your Honor, if we
24 come back in ten minutes I think that we'll have a shot at
25 getting through Dr. Peterson and maybe getting Mr. Hughes on

1 the stand. So it would be very good --

2 THE COURT: All right.

3 MR. BERNICK: -- because we'll be on schedule.

4 THE COURT: Okay. Thank you.

5 (Recess)

6 THE COURT: Please be seated. Mr. Finch?

7 MR. FINCH: Nathan Finch for the Asbestos Claimants'
8 Committee. Your Honor, the next witness called by the plan
9 proponents is Dr. Mark Peterson. Before we call him, I
10 neglected to offer for demonstrative purposes only Plan
11 Proponents' Exhibit 174, which is Dr. Welch's slide show.

12 THE COURT: Any objection to that for demonstrative
13 purposes?

14 MR. HEBERLING: It's for demonstrative purposes?

15 THE COURT: Yes.

16 MR. FINCH: Yes.

17 MR. HEBERLING: (Indiscernible).

18 THE COURT: All right. It's admitted for
19 demonstrative purposes. Can you swear Dr. Peterson so he can
20 sit down, Jan, please?

21 MARK ALAN PETERSON, PLAN PROPONENTS' WITNESS, SWORN

22 DIRECT EXAMINATION

23 BY MR. FINCH:

24 Q Good afternoon, Dr. Peterson. Could you state your full
25 name for the record?

Peterson - Direct/Finch

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1 A Mark Alan Peterson.

2 Q Did you prepare some slides to help describe and
3 illustrate your testimony today?

4 A Yes.

5 Q Could I -- you should have in front of you Exhibit 178A.

6 MR. FINCH: And, Your Honor, may I approach the bench
7 and hand the Court a copy?

8 THE COURT: Thank you.

9 Q Is the document you're holding that's on the screen the
10 slides you prepared, Dr. Peterson?

11 A Yes.

12 Q Could you describe briefly your educational background?

13 A I have an undergraduate degree from the University of
14 Minnesota, a law degree from Harvard, and a Master's and Ph.D.
15 in Experimental Social Psychology from the University of
16 California, Los Angeles.

17 Q Have you held any teaching positions at law school or
18 other places?

19 A Yes.

20 Q Describe those, please?

21 A I taught -- I was a visiting professor at UCLA. I taught
22 courses on law, and social science, and mass torts. I taught
23 at the RAND Graduate School, its Ph.D. program, on law and
24 social science, and while I was in graduate school I taught in
25 both the law school and the psychology department.

Peterson - Direct/Finch

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1 Q Next slide, please? You mentioned something called RAND.
2 Could you describe the work you have done at the RAND
3 Corporation and what that entailed?

4 A RAND, of course, is a public policy research corporation,
5 non-profit, independent, and I worked there for 25 years doing
6 empirical and quantitative research -- objective quantitative
7 research on the legal system, how it operates, both -- first in
8 the criminal justice area, and then in 1980 I was one of a
9 number of founding members of RAND's Institute for Civil
10 Justice, that really has come to be known as a preeminent
11 organization conducting policy research, empirical work on how
12 the civil justice system operates in this country. And for 25
13 years I conducted research in both areas, primarily civil
14 justice focusing in the area of mass torts.

15 Q Could you scoot forward a little bit and speak more
16 directly into the microphone? In mass torts did that include
17 asbestos claims?

18 A Yes. That's a primary area of asbestos, particularly how
19 asbestos claims are valued, how lawyers -- plaintiffs' lawyers
20 and defense lawyers value and settle asbestos claims. It was a
21 primary area of research.

22 Q Could you describe what you did to gain an understanding
23 and expertise as to the factors that go into valuing and
24 resolving asbestos personal injury claims while at the RAND
25 Corporation and since then?

1 A A number of sources. Primarily it's both large scale data
2 analyses for many databases of resolved asbestos claims.
3 Primarily in my consulting work it applied research that I
4 carry out, but some of that at RAND, as well. But I
5 supplemented that with extensive interviews, systematic
6 interviews using basically a Socratic method with plaintiffs'
7 lawyers and defense lawyers first for Judge Tom Lambros, who is
8 a U.S. District Court Judge in Cleveland, who ran the Ohio
9 asbestos litigation project, and he asked me to -- this was a
10 RAND project -- to spend a considerable amount of time in
11 Cleveland talking with the plaintiff and defense lawyers there,
12 asking them how they settle claims, changing one factor at a
13 time to see how it affected the values.

14 From that we developed what's called an expert system.
15 It's a computer system that took the rules that we generated
16 from those interviews and put them in a bunch of if/then
17 statements so that we could run a computer to try and think
18 like a lawyer. The primary problem with that is at the time
19 RAND was on a mainframe and it took so much power for the
20 computer to run we shut down the whole system at RAND once. We
21 ended up -- that work terminated. But I have done a similar
22 project like that for the Manville Trust.

23 So, throughout all of it this -- data analysis is central
24 to the work I do, but I believe in all of my work that you
25 can't make meaningful and intelligent analyses of data unless

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1 you really understand the phenomenon that you're looking at.
2 And here I get that by reading documents, by talking to
3 participants, by examining what's happened with regard to how
4 claims are resolved, and filed, and so on, which, for over 25
5 years that's been the center of my career.

6 Q Have you authored any publications in journals, peer
7 review journals about mass torts and asbestos -- mass torts
8 generally, and asbestos in particular?

9 A Yes. I've offered -- I've authored or co-authored 34
10 documents, and a substantial portion of them are in the area of
11 mass torts. These are both journal articles and also RAND has
12 a report system where it publishes monographs that are peer
13 reviewed similar to, and usually has a more extensive, I've
14 found, review process than even many periodicals.

15 Q Have you served as a Court-appointed expert to any Judges
16 on the valuation, and settlement, and resolution of asbestos or
17 other mass tort claims? Next slide, please?

18 A Yes, I have.

19 Q Can you describe that, please?

20 A Well, there are five instances. One of them was for Judge
21 Robert Merhige in the Dalkon Shield case is where we collected
22 data and reviewed that, provided the Court with -- and the
23 parties with information that they -- helped -- I was an expert
24 for the Court in designing that research project. I worked for
25 --

1 Q Dalkon Shield was what?

2 A An inter-uterine device manufactured by A.H. Robbins. It
3 was the A.H. Robbins bankruptcy. And that bankruptcy case was
4 in the mid-1980s.

5 Q Okay. Could you describe the work you've done for Judges
6 in asbestos-related litigation in valuing asbestos tort cases?

7 A Yes. I worked for four Federal and Bankruptcy Court
8 Judges as the expert for the Court, as a neutral expert, first
9 for Judge Lambros, as I've described. In addition to the
10 process I've described for Judge Lambros we also collected data
11 on resolved claims in order that we could then value new claims
12 as they came in based upon what was the historic settlements
13 for those claims.

14 I did a similar larger project for Judge Robert Parker in
15 the Eastern District of Texas involving a class action where we
16 collected data on 600 asbestos claims in Texas.

17 The largest project I've done was to work with Judge Jack
18 Weinstein and Burt Lifland on the Manville Trust restructuring
19 that Mr. Inselbuch referred to earlier. I was the special
20 advisor to the Court, where I provided both technical
21 assistance to the Court and to the parties of interest with the
22 Manville Trust, and also worked as the -- basically a special
23 -- as a mediator in helping to resolve the litigation. There
24 was a class action litigation filed in order to correct the
25 failures of the Manville Trust, which, as Mr. Inselbuch said,

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1 failed about a year after it was founded. It ran out of money.
2 It was dragged into so many trials it was spending \$50 million
3 a year in --

4 MR. KOVACICH: Your Honor, I object. The witness has
5 gone beyond the question that he was asked, and he's now giving
6 history on matters that are irrelevant to the issues at hand.

7 THE COURT: He's explaining his role, but I
8 understand that you were appointed as a special expert, and I
9 -- I believe there was one more.

10 THE WITNESS: Well, Lifland and Weinstein were two
11 Judges --

12 THE COURT: Oh.

13 THE WITNESS: -- one engagement.

14 THE COURT: Okay.

15 THE WITNESS: I worked on that engagement really --
16 when the class action was settled the settlement created an
17 office called the Special Advisor to the Trust, so I carried on
18 that work -- continued to work with the Courts until 2007, so
19 that was a 17-year engagement. In 2007 I was named a Trustee
20 of the Manville Trust, so I gave up that engagement.

21 Q Are you a Trustee of any other 524(g) or other asbestos
22 settlement trusts in addition to Manville?

23 A Yes, the Fuller-Austin Settlement Trust. It's a small
24 trust in Texas.

25 Q In your role as an advisor to the Courts on asbestos

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1 matters did you provide those Courts with quantitative analyses
2 of values of asbestos personal injury claims and the factors
3 that affect those values?

4 A Yes.

5 Q Have you ever provided expert testimony on asbestos
6 liabilities and the value of asbestos claims in connection with
7 either asbestos-related bankruptcies or asbestos class actions?

8 A Yes, I have. Also insurance litigation. I've testified
9 over 20 times -- I think by now it's close to 25 times, mostly
10 providing estimations of asbestos liabilities, but on other
11 matters, as well, in bankruptcies, class actions, and insurance
12 litigation.

13 Q Have you been recognized by Courts in the District Court
14 of Delaware relating to valuing asbestos claims and estimating
15 asbestos liabilities within the past five years?

16 A Yes. In Delaware, and I believe their trials were in
17 other jurisdictions. Yes.

18 Q Would that be -- could you list some of those cases?

19 A Armstrong, twice there, Owens Corning.

20 Q Turner & Newell?

21 A Turner & Newell.

22 Q Did -- next slide. Are you currently a consulting expert
23 to any asbestos trusts on their claims resolution procedures?

24 A Yes. I'm an expert for and a consultant for about 20
25 asbestos trusts on both matters of estimations of liability as

1 well as their trust distribution procedures and the
2 implementation and technical issues with regard to the trust
3 distribution procedures. I should state that in my engagement
4 in the bankruptcy cases I've also helped design and provided
5 data, and statistical analyses for the construction of trust
6 distribution procedures in virtually every case.

7 Q Have you been a testifying expert in litigation involving
8 insurance coverage issues?

9 A Yes. I've worked on -- for both sides. I've worked for
10 insurers. I was a testifying expert for Continental and Chubb
11 in the Ahern class action.

12 Q What's sometimes called the Fibreboard case?

13 A Yes. The Fibreboard case. Again, Mr. Inselbuch cross
14 examined me in that case.

15 Q Have you ever been asked to appear and testify before the
16 United States Congress on projections of asbestos claims and
17 projections of asbestos liabilities and the value of asbestos
18 claims?

19 A Yes. Three times on -- with regard to the issue of the
20 FAIR Act. Also, it involved looking at the ability to pay the
21 cost of the FAIR Act, so it was both sides of that.

22 Q Have you served as a consulting expert on the value of
23 asbestos claims and the factors that drive the value of
24 asbestos claims and estimations of asbestos liability to
25 parties over the past decade or more?

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1 A Well, other than these engagements I've worked with
2 insurance companies, with businesses, defendants.

3 Q Have you also done consulting work for asbestos claimants'
4 committees in bankruptcies in addition to this --

5 A Oh, certainly. Certainly. Yes. Asbestos claimants'
6 committees, I've worked for several representatives of future
7 claimants. I've really kind of had a gamut of interested
8 parties in my engagements.

9 MR. FINCH: Your Honor, at this time we would proffer
10 Dr. Mark Peterson as an expert in asbestos claims valuation,
11 which would include estimating the value of asbestos personal
12 injury claims, the factors that drive those values, the
13 projection of future asbestos personal injury claims, and the
14 cost to resolve pending and future asbestos personal injury
15 claims.

16 MR. KOVACICH: No objection.

17 THE COURT: All right. Dr. Peterson is permitted to
18 offer an expert opinion in those areas.

19 BY MR. FINCH:

20 Q Dr. Peterson, have you been retained by an expert in this
21 case?

22 A I've been retained as an expert --

23 Q Have you been retained as an expert in this case?

24 A Yes.

25 Q By what party?

1 A The Asbestos Claimants' Committee.

2 Q For what purposes?

3 A To both -- to provide analyses of asbestos claims,
4 estimates of liability, and how the plan or any proposed plan
5 or alternative proposed plans treat and deal with asbestos
6 claims, and particularly the development of trust distribution
7 procedures.

8 Q Did you provide reports both to the Asbestos Claimants'
9 Committee and to its members, and to the Court in which you
10 attempted to estimate what Grace's liability would be, or the
11 cost to resolve asbestos claims would be as of April 2001?

12 A Yes, I did.

13 Q Could you turn to Exhibit 199 in your exhibit book?

14 A Yes, I have that.

15 Q What's 199?

16 A That's my expert report on the issues that you just
17 inquired about, the estimation of asbestos liabilities.

18 Q That's the estimation of Grace's liabilities in the tort
19 system as of April 2001?

20 A Yes. These are in the tort system. There's a -- it was
21 originally done in June 2007. We had a couple of small
22 technical and typographical changes which we made in January
23 2009. This is the corrected edition.

24 Q Okay. So, the document 199 is the -- substantively the
25 same report you delivered to the Asbestos Claimants' Committee

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1 and the Court in June 2007 in connection with the estimation
2 proceedings?

3 A Yes. There were no substantive -- significant changes.

4 Q Okay.

5 MR. FINCH: Your Honor, we offer Exhibit 199 not for
6 its truth but just to show that this document was made
7 available to the members of the Asbestos Claimants' Committee
8 and the Court in 2007.

9 MR. KOVACICH: Objection. The document is hearsay,
10 and presuming the doctor is going to provide testimony on the
11 opinions set forth in the document, it would be cumulative of
12 his testimony.

13 MR. FINCH: Your Honor, I'm not offering the document
14 for its truth. I'm offering the document for the fact that Dr.
15 Peterson created a document, it was given to, among other
16 people, counsel for the Libby claimants back in 2007.

17 MR. BERNICK: Your Honor, from the debtor's point of
18 view -- you know how sensitive I am to the issue of what comes
19 in through experts -- there's an allegation that the ACC did
20 not deal with the Libby claimants' counsel and the Libby
21 claimants in good faith, and there's already been testimony
22 about this, but we want to bring out through Dr. Peterson that
23 his analysis was made available to them directly in connection
24 with the case.

25 MR. KOVACICH: If I may respond, Your Honor? Mr.

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1 Inselbuch already testified that the plan proponents considered
2 Dr. Peterson's evaluations. Dr. Peterson has and will continue
3 to testify that he advised those parties that the fact that
4 that occurred doesn't make his very lengthy substantive hearsay
5 report admissible in evidence.

6 UNIDENTIFIED ATTORNEY: It's not offered for its
7 truth, Your Honor.

8 THE COURT: The report is not being offered for the
9 truth. It's being offered only to show that it was of record
10 in these proceedings as of June of 2007 and available to the
11 parties. Here's the problem I have, Mr. Finch. I don't know
12 where it's made available to the parties or of record in these
13 proceedings. The witness has obviously prepared this report,
14 but I need some connecting up to show that it was, in fact,
15 provided. If it was, I'll accept it for that very limited
16 purpose, clearly not for the truth. But so far I don't have
17 that evidence on record.

18 MR. FINCH: Okay. I will have to prove up exactly
19 how it came, either through a stipulation or through another
20 witness. Dr. Peterson knows he created the report, but he
21 obviously can't say that he pushed the button and filed it with
22 the Court.

23 THE COURT: All right. Well, I'll accept it subject
24 to that trueing up at a later date.

25 BY MR. FINCH:

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1 Q Dr. Peterson, as part of your work in estimating Grace's
2 liability and costs to resolve pending and future asbestos
3 claims and in giving the recommendations to the ACC about TDP
4 values, did you have to become familiar with Grace's litigation
5 history and historical claim values?

6 A Yes. That's essential.

7 Q Can you describe how you went about doing that?

8 A Well, in a number of steps. One is that I, of course,
9 obtained the data about the -- the claims data that W.R. Grace
10 maintained, and did an enormous amount of analyses of that.
11 Two, I read documents, statements by W.R. Grace. such as
12 financial statements. Three, I looked at and read the
13 depositions and statements by persons who handled claims and
14 negotiated settlements on behalf of W.R. Grace.

15 Q Who specifically were those people?

16 A Mr. Hughes, among others. I know that there were several,
17 but his comes to mind. I looked at the -- in order to
18 understand the context in which these cases were settling,
19 because there were many references by W.R. Grace to the
20 changing litigation environment as of 2001 and how it would
21 affect their future settlements and expected claim filings. I
22 looked at what happened to the claim filings and settlements by
23 other defendants who remained in litigation beyond the point in
24 time W.R. Grace did. It provided basically a view as to how
25 the litigation continued and presumably would have affected

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1 W.R. Grace. Those are among the sources I looked at.

2 MR. FINCH: Could you put the slide show back up and
3 go to -- it's marked 23, but I think it's, like, the second
4 slide back from the one we were just at? That one. Yes.

5 Q Dr. Peterson, what did you learn about Grace's settlement
6 averages historically when you investigated its claims
7 litigation history?

8 A Well, this is the trend for mesothelioma claims. The
9 levels of settlements, the size of settlements differ by
10 disease. Mesotheliomas have the largest, lung cancer next, and
11 then other cancers next, and non-malignant. So, there's an
12 enormous variability in range with regard to each of those
13 diseases. The trends for all of them -- for all the cancers
14 were up, in particular, and mesothelioma is both the most
15 significant case because it involves the most money, and also
16 demonstrated a very strong upward trend, which is shown on this
17 Exhibit 23.

18 Grace's experience and the average settlement in constant
19 dollars, 2001 dollars, is the red line. It isn't always up.
20 It isn't steadily up. Statisticians say it's non-monotonic,
21 but it goes up and down with an upward trend. You can fit an
22 upward trend line to that. And the year to year variations, we
23 have some understanding about why those occurred.

24 Q Grace is the red line. What are these other companies
25 shown on here?

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1 A These are other --

2 Q Are these other companies? Is this their historical
3 mesothelioma values?

4 A Yes.

5 Q And what are these other companies, and why do they appear
6 on this chart?

7 A Well, there are other major companies that have
8 similarities to Grace, and also companies that I have data for.
9 I cannot get private data from companies that are still in
10 litigation. It's highly proprietary, and so that's not
11 available. I only -- I don't work for a lot of defendants. If
12 I did, I couldn't use it anyway. But we get the data when a
13 company goes into bankruptcy, and this shows information from
14 -- for other companies that went into bankruptcy, major
15 companies, of which three continued in litigation after W.R.
16 Grace entered bankruptcy in April 2001, and those three
17 companies are USG, Turner & Newell, and Quigley. And Turner &
18 Newell and USG both are companies that made -- that all made
19 construction -- products that were used in the construction
20 trades, and Turner & Newell also had mining operations,
21 different -- they weren't mining the same kind of mineral, but
22 they were mining asbestos fibers.

23 Q Are these averages nationwide settlement averages for all
24 these companies and Grace?

25 A Yes. My analyses are -- the questions I am asked and deal

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1 with are at a nationwide level, although we do look at some
2 information at state levels, too, but these reflect national
3 trends.

4 Q Generally speaking, when you do estimates of a company's
5 liability for purposes of estimating its tort liability or
6 giving advice to an Asbestos Claimants' Committee on TDP
7 values, do you use nationwide settlement data?

8 A Yes.

9 Q Nationwide averages?

10 A Yes. That's the pertinent level of analysis.

11 MR. FINCH: The next slide, please?

12 Q Did you come to have a view as to what factors were
13 causing Grace's costs to resolve asbestos personal injury
14 claims to go up at or around the time when it's going into --
15 went into bankruptcy?

16 A Yes. There are factors that were -- explained the most
17 recent increase, the 2001, for example, 2000/2001 levels, and
18 also represent trends that continued after the bankruptcy, so
19 they --

20 Q Let's talk first just about the things that happened up
21 until the time Grace went into bankruptcy. What were those
22 factors?

23 A Well, there are several, I think the most important of
24 which are on this demonstrative, Number 25, is the fact that
25 many other co-defendants, major co-defendants, went into

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1 bankruptcy in 2000 and 2001. Grace has commented on that those
2 bankruptcies would cause its settlements to increase and would
3 also cause it to receive more claims. They've made that
4 observation. Other companies have made that observation.

5 Q Grace made that observation where? In its --

6 A In its -- well, it's made again and again, but it appears
7 in its financial statements that are two pages earlier in this
8 book, and it also made -- and that was a 2007 financial
9 statement, the 10K. They also made it contemporaneous
10 statements in their financial statements of 2000 and 2001, and
11 also, I believe, the statements were made by representatives of
12 Grace during their depositions.

13 Q Okay. What -- in addition to the co-defendant
14 bankruptcies, what other factors increased, in your view,
15 Grace's costs to resolve asbestos claims?

16 A Well, the bankruptcies of the eight co-defendants affected
17 Grace and other defendants who remain in litigation, and for
18 this -- for forecasting we need to assume that Grace would have
19 remained in litigation, because we're estimating their tort
20 liabilities. There are other matters that affected Grace
21 specifically, and an important one was that it had become a
22 target defendant. Grace, in the 1990s, was a less significant,
23 more peripheral defendant that got increasing visibility in
24 part because plaintiff's lawyers were looking for additional
25 defendants that they could -- from whom they could get

1 compensation. So, that was a trend that was going on.

2 But that was accelerated by a number of forms of publicity
3 that were unfavorable to Grace describing its business
4 operations in Libby, Montana, and its exposure of persons in
5 Libby. There were newspaper articles nationally and
6 regionally, there were television documentaries, there were
7 books, a number of publications that had rather wide
8 circulation and visibility came to give a high profile to W.R.
9 Grace, really the highest profile of any defendant in the
10 country, exceeded perhaps only by Manville 20 years ago.

11 Q Since Grace went into bankruptcy have there been things
12 that have occurred in asbestos litigation that in your view
13 would have continued this trend you were observing in Grace's
14 claims history and settlement value history?

15 A Yes. I mean, these --

16 MR. FINCH: Could you turn two slides forward?

17 A Both of these matters, the bankruptcies of the other
18 defendants, the unfavorable publicity, the targeting of the
19 W.R. Grace, have continuing effects. I mean, they just didn't
20 stop in 2001. They continued to reverberate through the system
21 and affect people, other people, and would have affected Grace
22 today had it continued in litigation. But there are other
23 matters that have kind of happened since then. There are
24 bankruptcies of additional defendants that continue to occur,
25 not such a huge spike in significant defendants at one time,

1 but there are some major defendants who have continued to go
2 into bankruptcy, further diluting the amount of money available
3 to pay claimants by solvent defendants, and therefore
4 increasing the obligations and demands on other defendants,
5 like Grace, assuming that it continued -- it had still been in
6 the tort litigation. That's an important matter.

7 Q Were there other things that happened in the litigation,
8 generally, that had the effect of increasing claim values for
9 some types of claims and decreasing claim values for other
10 types of claims?

11 A Yes. There were a series of events, all having the effect
12 of sharply reducing the number of non-malignant filings in
13 asbestos claims. One of them is the criticism -- increasing
14 criticism of the medical practices in documenting non-malignant
15 claims. The defendants' insurance companies, even some Courts
16 (indiscernible) it, that kind of reached its height with Judge
17 Jack in Texas, who studied the practice for documenting
18 silicosis claims. It's a different disease, but the practices
19 used to screen claims, (indiscernible) claims, was very
20 similar, done by many of the same law firms. That, plus tort
21 reform that came in in a few of the major cases states, Texas,
22 Ohio, Mississippi, also struck a blow at non-malignant claims.
23 And then the plaintiffs' bar reoriented itself. It changed
24 from many law firms that previously had concentrated heavily on
25 these non-malignant claims, shifted their practices, greatly

1 dropping their non-malignant claims and beginning to advertise
2 for mesothelioma and lung cancers. That advertising -- I don't
3 know what it's like here, but in California it's just constant
4 and ubiquitous. And so, that all of that had the effect of
5 increasing the number of mesothelioma claims, sharply dropping
6 the number of non-malignant claims, and it had an important
7 effect on the values of claims because the biggest impediment
8 to a plaintiff in getting a large settlement is the ability to
9 get to trial.

10 As Grace noted, that it -- it tried to settle claims early
11 on in order to avoid getting near trial date because claims
12 values go up as trials approach. That's the time when the
13 plaintiff can finally hold the defendant accountable. And so,
14 the problem is that there were so many non-malignant claims in
15 litigation that it glutted the system and prevented many non --
16 many meso creditors to get a new trial. Now those claims are
17 gone, and they're gone because of the efforts of the
18 defendants, to a great extent.

19 Q The non-malignant claims are gone, basically?

20 A The non-malignants are gone. But ironically, in getting
21 rid of the claims they were trying to get rid of, they
22 increased the values of mesos because they've given them an
23 easier opportunity to get to trial. That was demonstrated
24 strongly by some changes in New York which basically really
25 greatly restricted unimpaired non-malignant claims. The

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1 consequence is that even more people got to try meso claims in
2 New York, the values went up.

3 Q The factors you've been describing, are these factors that
4 would apply in every single jurisdiction in the United States,
5 or are they factors that apply to Grace nationwide?

6 A Well, these -- all of these factors function differently
7 in different jurisdictions, and there, interestingly Libby is a
8 good example of that, because the factors that I mentioned that
9 were important here, the most important ones for Grace, the
10 bankruptcies of other co-defendants, the bad publicity, and --
11 about the activities in Libby, the inability to get to trial,
12 none of those -- they had a different -- they were -- it was a
13 different situation in Montana. Montana -- the knowledge of
14 Libby was there already. They didn't need to be informed.
15 People already hated Grace. And so, you know, they came to --
16 I don't mean to be disrespectful to your client, Mr. Bernick,
17 but I'm describing objectively what --

18 MR. BERNICK: It won't be the first time.

19 (Laughter)

20 A And so, that event, although it changed the litigation
21 nationally, didn't have much of an impact, because they were
22 already there. It's the same thing with regard to the
23 opportunities, or the loss of solvent co-defendants who paid
24 part of the liabilities. That didn't exist before, for the
25 most part, in Montana, and Libby, so the loss of those co-

1 defendants didn't really affect Grace very much. It was
2 already paying most of the liability. And similarly, the great
3 glut of claims that made it difficult -- extremely difficult to
4 get to trial in New York, or California, or Texas, wasn't as
5 big an issue in Montana because it has a much smaller case
6 load. So, none of those factors had nearly the same kind of
7 impact in Montana, but they did affect nationally, and they
8 drove up the averages, because the Libby claims and the Montana
9 claims are such a small part of the overall number of claims.
10 The lesser trends there, my expectation of the lesser trends
11 there wouldn't have affected the national trends. They were
12 just overwhelmed by the big changes that were occurring
13 elsewhere.

14 Q Could you turn to Slide 56? It's this one, the one that
15 has a table.

16 A Yes.

17 Q I'll just put it on the ELMO. What does that show, Dr.
18 Peterson?

19 A Well, we knew that values were going up for Grace, but
20 because they're in bankruptcy they weren't settling, so we had
21 to estimate what would have been the amount, would quantify the
22 change. And so, I used five different methods to quantify what
23 the amount of the change is. Two of them were based
24 exclusively on W.R. Grace data. We looked at what's the -- the
25 historic trends over time, and the reach of the diseases using

1 multiple regression, a technique that lets you look at what's
2 the annual effect, the trend, time trend, taking into account
3 -- in this case we took into account state, because values
4 differ from state to state and we wanted to reduce the
5 possibility that in some years there may be more Texas claims
6 than other years, for example.

7 The second was just a short term increase, we just
8 looked at how much the W.R. Grace settlements had increased
9 over the last five years and just extended that trend up into
10 the future.

11 The other three was to look at these defendants, who
12 I already mentioned, comparable defendants, to see what
13 happened to them after Grace went into bankruptcy with regard
14 to those settlements, so we looked at the averages for Quigley,
15 Turner, Newell and U.S.G. and basically said that W.R. Grace
16 would experience similar levels of increase that we saw for all
17 three of those defendants although we spread that increase for
18 Grace out over six years, rather than -- for each of those
19 companies, that change occurred in a year. but we spread that
20 out in order to be conservative. And that's what this table
21 reflects.

22 Q Okay. And this shows the various diseases, asbestos
23 related diseases as shown in the Grace database and your
24 projections of what the claim values for those diseases would
25 be under the different approaches, had Grace stayed in the tort

1 system and not gone into bankruptcy?

2 MR. KOVACICH: Objection, leading.

3 Q Could you --

4 A Yes, this table shows the results of each of those five
5 analyses, by disease, by the method and it shows, for example,
6 for mesothelioma, they were paying on average, in the \$90,000
7 for mesothelioma in 2001 when they went into bankruptcy. And
8 these analyses are actually remarkably consistent, even though
9 they're different methods and different data, and they show
10 that by 2006, the average mesothelioma -- or value of a
11 mesothelioma claim, by each of these five methods, ranges from
12 188,000 to \$225,000.

13 Q I don't see anything on here about consortium claims or
14 wrongful death claims. How does the Grace database deal with
15 consortium or wrongful death claims?

16 A Well, it identifies consortium claims and wrongful death
17 claims in the database. It's a --

18 Q But is there any value shown for those claims?

19 A No. Well, what they do is, they consolidate the claim
20 with the underlying injury claim. And so, you link them
21 together. I mean, they're linked together by Grace in the
22 database and we link them in our analysis. We sum the values
23 across all of them. So, if there's a consortium or wrongful
24 death and an injury claim, we add them all up, but invariably,
25 the consortium -- I don't think the consortium claim ever had

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1 independent value placed on it, in the database. That didn't
2 mean that it didn't have value and influence how much Grace
3 paid on settling their claim, but it's just -- whatever it is,
4 it's the consolidated number. These analyses that we've done
5 for the use of the W.R. Grace data is for all of the ancillary
6 as well as original injury claims tied together for the same
7 person.

8 Q So, let's just play that out with a hypothetical. Would
9 the settlement averages you use in your analyses and forecast,
10 include, for example, for the mesothelioma claims, would that
11 also include a component in there that would pick up the piece
12 of a mesothelioma claim that was a consortium claim that goes
13 into the average value used nationwide?

14 MR. KOVACICH: Objection. This is leading and it's
15 also repetitive of his prior answer.

16 THE COURT: Well, it is leading but I think it's
17 trying to get a clarification and if it's repetitive I think I
18 need to hear it so that I understand how it does and doesn't
19 work. So, Dr. Peterson, if you --

20 Q To cure the leading, Dr. Peterson, could you explain how
21 the consortium claim affects the value of the mesothelioma
22 average used in the TDP and in your estimates of liability?

23 A It increases the values that we place on mesothelioma
24 claims -- that Grace placed on mesothelioma claims and that we
25 place on mesothelioma claims, to the degree that it influenced

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1 how much Grace settled by. It has precisely the same impact
2 that Grace gave it.

3 If a consortium claim increased the value of a claim
4 so that W.R. Grace settled it for \$20,000 more, the database
5 reflects that, we used the data as it's reflected by adding in
6 that additional value of consortium claim. If it wasn't taken
7 or counted, it had no value, it doesn't have an affect, but
8 however Grace addressed it, it's reflected in the database.

9 Q Okay. Is that true for both consortium and wrongful
10 death?

11 A That's true for consortium, and wrongful death and also as
12 part of the work I've done, I didn't mention it earlier, but I
13 reviewed hundreds of case files for W.R. Grace.

14 MR. KOVACICH: I object, Your Honor. The witness is
15 giving a speech beyond the scope of the question he was asked.

16 THE COURT: All right, that's sustained. I'm still
17 not clear, then, Mr. Finch. If I may. Dr. Peterson, I'm not
18 clear about whether in the database is there a separate value
19 reflected for a wrongful death settlement, for example?

20 THE WITNESS: There is a place for a value, if there
21 is a value. But it is always a zero value for consortium claim
22 in W.R. Grace's database. So, they never give it an explicit
23 value. What I'm saying is that it may have had an implicit
24 value and be taken into account in considering the underlying
25 claim. We put -- we add these together, but we're adding zero

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1 in.

2 THE COURT: All right. Thank you.

3 THE WITNESS: But it's never explicitly given a
4 value.

5 THE COURT: Okay, thank you.

6 Q So, just to keep it on the level of an individual case,
7 assume a hypothetical where you had a Mr. and Mrs. John Smith,
8 and Mr. Smith had mesothelioma, and Grace settled Mr. Smith's
9 mesothelioma claim and Mrs. Smith's consortium claim and Mr.
10 Smith got \$100,000 and Mrs. Smith got \$20,000, how would the
11 database record that phenomena?

12 A It's \$120,000 stated with regard to the claim by Mr. Smith
13 and zero with regard to Mrs. Smith.

14 Q Next slide. What does this slide show, Dr. Peterson?

15 A This slide shows the TDP values that Mr. Inselbuch
16 discussed on the right side for each of the categories, disease
17 categories in the W.R. Grace trust proposed TDP. In the column
18 to the left of it is the average values for each of the
19 diseases we estimate they are at the current time for W.R.
20 Grace.

21 Q Did you, in fact, provide advice to the committee, the
22 Grace Asbestos Claimants Committee, as to what the scheduled
23 and average and maximum values could be for the Grace TDP?

24 A I made a suggestion of what would be, I believed,
25 appropriate TDP values, yes.

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1 Q Based on Grace's history as you expected it to continue?

2 A Well, it's based on its history as we've kind of advanced
3 it by these analyses and also based on looking at what are the
4 levels of TDP values, the relative levels of TDP values in
5 other cases.

6 Q Did -- and what does the next slide show?

7 A The next slide is identical, except here it shows the
8 amount that Grace was paying in 2001 to resolve the claim. This
9 is the actual settlement amounts at the point in time just
10 before Grace went into bankruptcy.

11 MR. FINCH: Can I have the ELMO please?

12 Q I note on here that the non-malignant value is the same
13 across all the categories in the non-malignants on the left
14 hand column, Grace 2001 settlement average. Can you explain to
15 the Court why that is?

16 A Yes. The W.R. Grace database, and no defendants database,
17 provide the data necessary to dis-aggregate the non-malignant
18 claims, they differ by severity, that's been talked about a lot
19 today, but the database doesn't say this is a severe asbestosis
20 case as opposed to this is an unimpaired asbestosis case.
21 There is no reliable data -- there are no reliable data about
22 that.

23 And, so, we can't look and character it -- what was
24 the average among the severest asbestosis cases, for example,
25 because we don't know which of the asbestosis cases are severe.

1 So the \$3,472 reflects the average across all non-malignant
2 claims and you can see that the actual -- the TDP values are,
3 in some instances, less. They're the cases that would have
4 been at the lower end of whatever generated that \$3400 average
5 and the severe asbestosis are higher.

6 But we can't -- that's the part we can't quantify and
7 that's why in doing a TDP it's helpful and instructive to look
8 at what have been the TDPs that other parties have agreed to,
9 and what courts approved, to get some sense of what's the
10 relative value that people generally put on different kinds of
11 non-malignant claims.

12 Q Did you have discussions about the claim values and the
13 TDP values across the disease categories with counsel for the
14 Libby claimants?

15 A Yes.

16 Q Did you ever tell them that the factors which affected
17 Grace's nationwide settlement averages would also increase the
18 value of their claims in the same way?

19 A I said the contrary to that.

20 Q Can you describe for the Court what you told the Libby
21 claimants counsel about that?

22 A Well, there was a discussion about analyses that counsel
23 had done with regard to his attempt to estimate, kind of
24 updated current values for Grace in Libby.

25 Q Counsel for who had done that? Counsel for --

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1 A Mr. Cohn, counsel for the Libby claimants.

2 Q Mr. Dan Cohn?

3 A Yes. And part of that was, they used an earlier analysis
4 that we had done we don't use now, it doesn't figure into any
5 of our estimates in this case and it doesn't figure into the
6 TDP construction, but where we did have some markup in value,
7 we were trying to figure out how can we estimate
8 (indiscernible) -- but I told them that I did not believe that
9 was appropriate to do for the Grace cases for the reasons --
10 for the Grace cases in Libby, for the reasons that I discussed
11 earlier. That one would not --

12 UNIDENTIFIED MALE SPEAKER: Your Honor, we're have a
13 difficult time hearing over here, I'm sorry.

14 MS. HELLER: Is it lighting?

15 THE WITNESS: It's lit now, I apologize. I'm sorry.

16 Q Go back, what did you tell the Libby claimants about their
17 -- what you believe would happen to their values?

18 A I believe that -- I told them that the reasons that the
19 values increased nationally and the reasons that I justified
20 the -- whatever amount of adjustment quantitatively one puts in
21 for the national average, is not an appropriate adjustment for
22 Libby because the events that explain why values increase were
23 not events, were not affects that actually happened in Libby,
24 as I've already explained.

25 Q Such as what?

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1 A The fact that people already despised Libby when they were
2 settling before the bankruptcy.

3 Q Despised Grace.

4 A Excuse me, I beg your pardon, I apologize. People
5 despised -- people in Libby despised Grace already and they
6 were holding it against them and it affected settlement values
7 there. That occurred before the bankruptcy, the increase in
8 publicity didn't really affect that like it did nationally,
9 where people learned about the Libby situation for the first
10 time. Similarly, since Grace was already paying virtually all
11 of the liability when it was -- before its bankruptcy, there
12 was no way to go up because it wasn't assuming a larger part of
13 that share, it was already paying it.

14 Q What about the co-defendant bankruptcies?

15 A That's the explanation for the co-defendant bankruptcy.
16 The co-defendant bankruptcies did not have an impact in Libby
17 because Grace was already paying almost all the liability.

18 Q I'm going to put the four on the ELMO, a chart that the
19 Libby claimants have put in their trial brief in this case.
20 The left hand column shows that they say is their -- what they
21 --

22 MR. BERNICK: Zoom. It can't be read. Excuse me.

23 Q Dr. Peterson, this is a Page 18 of the Libby claimants'
24 trial brief, Your Honor. The left hand column shows what Libby
25 says is its historical settlement and verdict amounts and then

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1 it has various adjustment factors. First of all, Dr. Peterson,
2 did you investigate Libby's historical judgments and verdict
3 amounts?

4 A Yes.

5 Q Do you believe this chart is a fair depiction of your
6 views and your work as to what the impact would be on Libby's
7 historical settlement averages going forward?

8 MR. KOVACICH: I object, Your Honor. This goes
9 beyond any opinion disclosed in Dr. Peterson's report.

10 MR. FINCH: Your Honor, this --

11 MR. KOVACICH: He does not set forth a projected
12 growth rate for Libby claims and he provides no opinion
13 commenting on the numbers that Mr. Finch is asking him about.

14 MR. FINCH: This is fact witness testimony, Your
15 Honor, this is Dr. Peterson, what he told the Libby claimants
16 about -- I believe an expert is entitled to respond to a
17 misleading characterization of his work. They have put before
18 this Court a document which they purport to say is Dr.
19 Peterson's opinions about what would happen to the Libby
20 values, and as he just testified a moment ago, he did not say
21 that the Libby values would be inflated in the same way or
22 increased in the same way that Grace's nationwide averages had
23 been increased, and I think it's fair and proper to ask him,
24 did he ever tell the Libby claimants that this chart was
25 accurate. They have represented to this Court that he had

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1 something to do with this chart and, therefore, I think it's a
2 proper question to him, to ask, Dr. Peterson do you believe
3 this chart is an accurate representation of your work and the
4 opinions you gave to the Libby claimants about claims values?

5 MR. KOVACICH: To the extent we're talking about Dr.
6 Peterson's discussion with the Libby claimants' lawyers, he's
7 already testified that he advised them he did not think the
8 claims should be growing in the same manner. To the extent he
9 has an opinion about the numbers utilized in the Libby
10 claimants' brief, that opinion was not disclosed and it should
11 not be admitted in this hearing.

12 THE COURT: Is there a representation that this work,
13 that the chart, is derived from analyses provided by Dr.
14 Paterson?

15 MR. FINCH: The footnote says the Libby claim figures
16 have been brought current using the same adjustment developed
17 by Asbestos PI Committee's estimation expert, Dr. Mark
18 Peterson, to bring Grace's pre-bankruptcy verdict settlement
19 figures into line with current values for purposes of the TDP.

20 I think that's an implicit, if not explicit,
21 representation to the Court that Dr. Peterson had something to
22 do with the information on this chart, that they used his work
23 in constructing this chart. And he did not ever provide them
24 with the opinions that their values would be anything close to
25 what is shown in the third -- or excuse me, the fourth column

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1 on this chart. I think that's proper both fact witness
2 testimony and to avoid their misleading use of a document to
3 the Court.

4 MR. KOVACICH: The manner in which these values are
5 reflected in the brief is explained in the brief with reference
6 to work that Dr. Peterson previously did. To the extent the
7 plan proponents disagree with the way in which it was used,
8 they can certainly make those arguments. They cannot bring
9 forth an expert witness to comment on something when the expert
10 witness was not disclosed to do so.

11 MR. BERNICK: Nate, when was the brief filed?

12 MR. FINCH: The brief was filed July 20th 2007, Your
13 Honor.

14 THE COURT: Dr. Peterson may be an appropriate
15 rebuttal witness if, in fact, there is some evidence brought
16 forth about this, otherwise, I understand that what has been
17 done is that someone took what they view Dr. Peterson's work to
18 have been and applied it to their own figures in a fashion they
19 think Dr. Peterson would have used. I'm not sure that there is
20 an assertion anywhere that Dr. Peterson was responsible for
21 this chart. Is there that assertion?

22 MR. KOVACICH: No, Your Honor, there is not.

23 THE COURT: Okay.

24 MR. FINCH: Okay. If the Libby claimants do put on,
25 attempt to put on evidence that that's what their values would

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1 be, then we will bring Dr. Peterson back to rebut that.

2 THE COURT: All right. That may be appropriate
3 rebuttal.

4 Q Dr. Peterson, did you do anything as part of your work in
5 this case to analyze the magnitude of successful plaintiffs'
6 verdicts against Grace in non-malignant cases in Libby, as
7 compared to outside of Libby?

8 A Yes.

9 Q Could you turn to the last slide in your book?

10 A Yes, Page 62 is the number.

11 Q First of all, how did you go about doing that?

12 A We had data on the database about the Libby settlements
13 and we had both data and we had --

14 Q You're talking verdicts?

15 A Verdicts, these are verdicts. These are for non-malignant
16 claims. All these are non-malignants.

17 Q And what did you learn about the size of successful
18 plaintiff verdicts for non-malignant claims in Libby as
19 compared to the size of successful plaintiff verdicts for
20 non-malignant claims outside of Libby?

21 A Well, the non-malignant verdicts in Libby were actually
22 less than non-malignant verdicts that were entered in other
23 case, in other states. The three top numbers, 585, 250 and
24 413,000 were the Libby. I think we got that data, those
25 rounded numbers, from the Libby counsel.

1 The other three were provided by data and
2 supplemental information from W.R. Grace. There were eight
3 verdicts involving a non-malignant claim outside of Libby, of
4 which five are under appeal, and if you include the ones under
5 appeal, obviously, the non-malignant average is far higher,
6 when the verdict is reached outside of Libby than there, and
7 even if you exclude the under appeal, they're still
8 substantially higher in the verdicts reached in jurisdictions
9 other than Libby, than they are in Libby.

10 Q And did you, in one of your expert reports do the math to
11 show what the averages were for the Libby verdicts, the
12 successful plaintiffs verdicts in Libby, Montana, as compared
13 to the successful plaintiffs' verdicts outside of Libby?

14 A Yes.

15 Q And, do you recall what those averages were?

16 A Offhand, I don't.

17 Q Would it refresh your recollection to look at your trust
18 report, Exhibit 201, Page 9? Bottom of the page.

19 A Yes. I see it.

20 Q And, what is the average for successful plaintiffs'
21 verdicts in Libby?

22 A \$416,000.

23 Q And, what's the average for successful plaintiff verdicts
24 outside of Libby, not including cases under appeal?

25 A It's a little over a million, 1,027,995.

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1 Q And, if you include the plaintiffs verdicts where there is
2 an appeal pending, what's the average for outside of Libby, in
3 non-malignant cases?

4 A \$5,188,950.

5 MR. FINCH: Your Honor, at this time we offer Exhibit
6 178A for demonstrative purposes only.

7 THE COURT: All right, it's accepted for that purpose
8 only.

9 MR. FINCH: Pass the witness.

10 CROSS EXAMINATION

11 BY MR. KOVACICH:

12 Q Good afternoon, Dr. Peterson.

13 A Good afternoon.

14 Q I'm Mark Kovacich on behalf of the Libby claimants. Dr.
15 Peterson, one of the goals of the TDP that you helped develop
16 is to pay claimants as equivalent a share as possible of the
17 value of their claim in the tort system, right?

18 A It's to -- that is a goal. It is -- it's to pay them
19 values that are not necessarily precisely what they got in the
20 tort system, but what they would have gotten, you don't know
21 that, but to pay them what -- values that are appropriate,
22 given the values in the tort system. I'm probably more
23 comfortable with that.

24 Q One your goals in establishing claim values in the TDP was
25 to set those values consistent with tort system values for

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1 similar claims, right?

2 MR. BERNICK: Objection. Are we talking about the
3 scheduled values? Objection to ambiguous.

4 THE WITNESS: The --

5 THE COURT: Pardon me just a second. Can you restate
6 the question, please?

7 Q My question is, Dr. Peterson, isn't it true that one of
8 your goals in establishing claim values in the TDP was to set
9 values consistent with tort system values for similar claims?

10 THE COURT: That's the same question you just asked.
11 Can you rephrase the question, please?

12 Q Dr. Peterson, what values did you provide assistance to
13 the plan proponents in developing for use in the TDP?

14 A We proposed to them the schedule values, the average
15 values and the maximum values for each of the disease
16 categories, that represented our conclusion about what would be
17 the current levels of those values now, against Grace, in the
18 tort system, at a national level.

19 Q And you also assisted with the provisions in the TDP
20 addressing extraordinary claims and providing a multiplier for
21 that purpose, right?

22 A We did analyses of that issue. I don't think that I
23 proposed the eight fold value. I don't think that was
24 something I had proposed.

25 Q I'm sorry, I didn't ask if you proposed that, I asked if

1 you assisted in the process whereby those multipliers were
2 incorporated into the TDP.

3 A We -- I'm not sure that that's correct. We did what I
4 said I did, by looking at how that corresponds to values in
5 Libby, for example, but that's kind of what we did. You can
6 characterize that however you want.

7 Q To the extent that you assisted in developing values for
8 the TDP as you've described, one of the goals in doing so was
9 to set those values consistent with tort system values for
10 similar claims, right?

11 MR. BERNICK: That's the same question --

12 MR. FINCH: Objection.

13 UNIDENTIFIED ATTORNEY: Asked and answered.

14 MR. KOVACICH: Your Honor, it wasn't answered because
15 it was objected to, and I was instructed to change the
16 question.

17 THE COURT: Yes, but it is still the same question. I
18 think the witness has said he -- as I understand it, he did not
19 set that formulation of the multiplier, so I'm a little unclear
20 what you're asking. I'm sorry. Could you rephrase it for my
21 benefit? Even if the witness understands it, I didn't.

22 Q My question, Dr. Peterson, was simply whether one of your
23 goals in assisting with the development of the TDP values was
24 to set those values consistent with the tort system values for
25 similar claim.

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1 A One of a number of goals is to create TDP values that are
2 not inconsistent with the tort values but that's a national
3 goal, it's not on case by case basis. I can't do that, the TDP
4 isn't constructed that way because many of the claims get their
5 values through individual review, there isn't a set value. But
6 the values that need to be put into the TDPs should be
7 consistent generally with the relative values of diseases as I
8 think they would be paid now by Grace, at a national level.
9 But it's a national goal, it's not case by case.

10 Q Well, one of the reasons that you provide for the
11 individual review is so that there's enough flexibility to
12 allow the trust to pay claims which have different
13 circumstances, according to what the values were for similar
14 claims in the tort system prior to the bankruptcy.

15 MR. BERNICK: Objection. (A) lack of foundation; (B)
16 it's beyond the scope of his testimony, it deals with trust
17 practice and (C) it's ambiguous according to, or in accordance
18 with is not a precise term.

19 THE COURT: Want to rephrase the question, please.

20 Q Dr. Peterson, do you agree that the scheduled values in
21 the TDP do provide a fair estimate of tort system value?

22 A I believe they do, an average national value, yes. Again,
23 they're highly variable, case to case.

24 Q When you performed your work to assist with the
25 development of the scheduled values under the TDP, one of the

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1 things you did is, as you've described, is review historical
2 settlement and verdict amounts in cases against Grace, right?

3 A Yes.

4 Q And, the reason that you did that was in order to
5 establish values which were consistent with the tort system
6 values as determined by settlements and verdicts in cases
7 against Grace, correct?

8 MR. BERNICK: Your Honor, this is now the fourth
9 time. He's asked -- I mean the witness has testified as to
10 this, but this is argumentative at this point. Four different
11 times he's asked this question, Your Honor sustained the
12 objection three times, we then let him ask it the last, without
13 objecting and apparently, he's still not happy.

14 THE COURT: I think the witness has answered the
15 question as to what he did. If you're asking a different
16 question, then it sounded the same to me, too.

17 MR. KOVACICH: I apologize if it was the same
18 question, I think that was the first time I asked him why he
19 utilized the historical settlement and verdict amounts in
20 developing the TDP values.

21 THE COURT: You're asking why he used those as
22 opposed to the fact that he was trying to emulate those values?

23 MR. KOVACICH: My question was, whether Dr. Peterson
24 agrees that he used those values, so that the scheduled values
25 in the TDP would, in fact, be consistent with the values of

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1 similar claims in the tort system.

2 THE COURT: Okay. That question he has answered, but
3 Dr. Peterson, you can try it one more time.

4 THE WITNESS: I have a different problem with your
5 question. When you inserted the historical -- consistent with
6 historical values. As I described in my direct testimony, the
7 historical values for Grace are actually lower and I don't
8 believe are an appropriate guide as to what the current values
9 are, or what the TDP values should be. So, I tried to set it
10 based upon my best expert judgment about what is the current
11 values of those claims against Grace but those were my
12 analyses, they're numbers that I provided, they weren't taken
13 out of a database. They were guided by the database, we used
14 the database in multiple ways that I previously testified to,
15 in order for me to arrive at my opinions, but we didn't use the
16 historical data directly in this analysis. And so, that was
17 the predicate of your question.

18 Q Do you agree that past settlements provide a useful data
19 because they present the best evidence of how the actual
20 participants in the litigation valued their claims?

21 MR. BERNICK: I'm sorry. Objection to form. Useful
22 data for what purpose? We're here to talk about the TDP.

23 MR. KOVACICH: I am talking about the TDP.

24 MR. BERNICK: Well, then if we have -- I'm sorry, if
25 we have a question that specifies the TDP, it would be better.

1 THE COURT: Can you rephrase the question and then
2 we'll assume it's about the TDP until you change that analysis.

3 Q Do you agree, Dr. Peterson, that past settlements provide
4 useful data to your efforts in developing values under the TDP
5 because they present the best evidence about how the actual
6 participants in the litigation valued their claims?

7 A Yes, they're useful, but they're not sufficient in this
8 case.

9 Q When Grace settled cases prior to entering bankruptcy it
10 did so because it recognized risk that it might be found liable
11 for more than it paid to settle those cases, do you agree with
12 that?

13 A I'm sorry, I didn't track the question, could you repeat
14 it?

15 Q When Grace settled asbestos injury cases prior to its
16 petition for bankruptcy, it did so because it recognized risk
17 that it might be found liable for more than it paid to settle
18 those cases, right?

19 A Yes.

20 Q And, that was true with respect to the settlement amounts
21 that Grace voluntarily paid in Libby as well as elsewhere
22 around the county, right?

23 A Yes.

24 Q You agree there are a number of factors that influence
25 claim value in the tort system?

1 A Certainly.

2 Q Nature of disease is one of those factors, you've talked
3 about that quite a bit here today?

4 A Yes.

5 Q Another factor that influences claim value in the tort
6 system is evidence regarding the extent of exposure?

7 A It has -- it's an important element for affecting relative
8 values, particularly if cases are individually reviewed or go
9 to trial, or prepare to go to trial. It's probably less
10 important for cases that are settled in mass.

11 Q Another important factor is the strength of the
12 plaintiffs' liability case?

13 A That's pretty much the same issue as the one we discussed
14 and I'd give the same answer.

15 Q You're aware that Grace paid high settlements and verdicts
16 to plaintiffs in Libby, Montana, compared to most other
17 jurisdictions?

18 A To most other, yes, not all.

19 Q And, you believe that those higher values were due in part
20 to the fact that all or almost all of the Libby plaintiffs'
21 exposures were to Grace asbestos?

22 A That's a major part of it, yes. It's not the sole reason.

23 Q Most other claimants in the Grace bankruptcy were exposed
24 by and have claims against multiple defendants?

25 A Yes.

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1 Q Another reason that you've identified for higher values in
2 Libby is that the Libby plaintiffs claim more serious
3 non-malignant injuries than what you typically see elsewhere?

4 A I don't know that I -- they claim that, I think that Grace
5 would not acknowledge that the claim is correct. So, I'm not
6 sure that that was a -- hard to know how significant that was.

7 Q Dr. Peterson, you have a copy of the report that you
8 prepared in the estimation case? I thought that was one of the
9 exhibits that counsel handed up.

10 A Yes, yes.

11 MR. FINCH: 199.

12 THE WITNESS: I have 199, yes.

13 Q I apologize. Actually, I want to ask you about the report
14 that you prepared in March of 2009, titled Preliminary Expert
15 Report on W.R. Grace --

16 A I've got -- yeah, I have that as well. Thank you.

17 THE COURT: Is it an exhibit?

18 MR. KOVACICH: It would be --

19 THE WITNESS: 201, Your Honor.

20 THE COURT: Thank you.

21 Q At Page 9 of that report, Dr. Peterson --

22 A I have that.

23 Q -- the third full paragraph.

24 A That begins the relatively high --

25 Q The first sentence in that paragraph states, the

1 relatively high historic values paid by Grace to Libby
2 claimants seem to reflect matters that are addressed in the
3 TDP. Did I read that correctly?

4 A Yes.

5 Q And, then you go on to discuss some of those factors, one
6 of which, in the third sentence states, "Libby plaintiffs often
7 claim much more serious non-malignant injuries than we have
8 seen for the nation as a whole", right?

9 A Yes. It's extended and explained in the next sentence.

10 Q Dr. Peterson, to account for the higher settlement and
11 verdict values that you observed in Libby, you assisted the
12 plan proponents in developing an extraordinary claims
13 multiplier that was intended to address that situation, right?

14 A In the manner that I previously described to you, yes.

15 Q The eight times multiplier for extraordinary claims?

16 A Well, I looked at how it compared with values, the values
17 of -- I did a number of quantitative analyses, where an eight
18 times multiplier was an assumption in the analysis. That's
19 what I did.

20 Q You understood that the purpose of the eight times
21 multiplier was to address the unique circumstances that existed
22 with respect to claims in Libby.

23 MR. BERNICK: Objection to the form of the question,
24 what circumstances?

25 THE COURT: That's sustained.

1 Q Dr. Peterson, what was your understanding as to why the
2 extraordinary claims provisions in the TDP provided for an
3 eight times multiplier in cases involving 95 percent exposure
4 to Grace asbestos?

5 A It was to address the issue that the Libby claimants
6 raised about the fact that they had claimants who were exposed
7 exclusively, or almost exclusively, by W.R. Grace. I think
8 that's a generally understood event and it was a concession on
9 the part of the ACC to have a more generous treatment of
10 extraordinary claims in order to give greater compensation to
11 the Libby claimants.

12 Q The same eight times multiplier applies with respect to
13 extraordinary claims regardless of the disease category for the
14 claim, right?

15 A Yes, it does and it applies to claims not just -- I don't
16 want to imply that that's just for Libby, it applies to claims
17 from any location.

18 Q How did you come up with eight as the number for the
19 multiplier?

20 A I testified and told you that I didn't.

21 Q Do you have any personal knowledge as to who did come up
22 with eight times as the appropriate multiplier to address the
23 extraordinary claims involving 95 percent exposure to Grace
24 asbestos?

25 A Specifically, no.

1 Q As you sit here today, you have no idea, whatsoever, as to
2 how that eight time multiplier was derived, is that accurate?

3 A That's correct. Well, I understood why it was done, so
4 how that part -- I just don't know who came up with it or why
5 they settled on eight. It wasn't a decision that I
6 participated in.

7 Q And, you're not able to offer any opinion, therefore, as
8 to whether that eight times multiplier is an appropriate figure
9 to address the circumstances of those cases?

10 A Oh, no, that's a different question. I think it's an
11 appropriate number. I just didn't originate it and I don't
12 know who did.

13 Q On what would you base your conclusion that it's an
14 appropriate number?

15 A It provides compensation to Libby claimants and people
16 with -- well, in Libby specifically, it would apply a level of
17 compensation that is quite close to what people got
18 historically, consistently with the multiple objectives of the
19 trust distribution procedures.

20 Q And how are you able to determine that the eight times
21 multiplier provides compensation consistent with what people
22 got historically?

23 A I have data on what people got historically, by what the
24 Libby claimants received. I was provided that data by your
25 counsel.

1 Q And, you reviewed that data and determined that a
2 multiplier of eight times across all disease categories would
3 provide compensation consistent with what those claimants
4 received pre-bankruptcy in the tort system?

5 A Well, I have a continuing problem with your word
6 consistent, because you're setting a general rule that applies
7 to specific cases and like any of the rules of the TDP, it fits
8 some cases more closely than others. It's an attempt, again,
9 it's a rough justice notion, as Mr. Inselbuch said, that all of
10 the TDPs strive to achieve rough justice and on average, if you
11 assume that claimants will get -- will, for example, be
12 eligible for the 4B category and they get an eight fold
13 increase, the values that that would imply to the more serious
14 non-malignant claimants in Libby, are consistent with the
15 values they got historically, I can't say that it's precisely
16 the same, it won't be in every case.

17 Q And I apologize, I didn't think I asked you if they were
18 precisely the same, I believe I asked if they would be
19 consistent. You --

20 A I would say generally consistent. And also -- but I added
21 -- I interrupted you, I'm sorry. Generally consistent but also
22 the TDP has to reflect multiple objectives. I mean it doesn't
23 serve just one objective. One, it is -- is to conserve the
24 assets; two is to treat people relatively equivalent, from
25 state to state, case to case, and to distribute money across

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1 all people, and also to prevent a run on the store. It has all
2 those objectives and they all have to be taken into account.
3 There's multiple things one has to do in order to deal fairly
4 with the claimants.

5 MR. KOVACICH: Your Honor, I move to strike the
6 witnesses speech that was not responsive to my question.

7 MR. FINCH: That's directly --

8 THE COURT: He -- that's overruled. He asked whether
9 he should, essentially continue and you didn't tell him not to.
10 So, I think that's responsive to the question.

11 Q What data did you consider when you determined that the
12 eight times multiplier, as compared to the Libby claim values,
13 would be generally consistent -- would provide compensation
14 generally consistent with what they got in the tort system?

15 A Let me be hypothetical, but specific. We would look at a
16 -- the maximum amount that a claimant might get and the
17 scheduled amount, I mean kind of a range, and multiply the
18 number -- actually it's a scheduled value, it's multiplied by
19 eight. You would take the scheduled value and multiply it by
20 eight for mesothelioma. So, it's -- whatever the scheduled
21 value for mesothelioma -- 180,000, I guess, multiply that times
22 eight and look -- does that seem to be an adequate amount of
23 compensation when you look at what the Libby claimants got
24 historically and our conclusion was, yes, that appears to be a
25 number that's consistent with what people got historically.

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1 Q Did you do that analysis taking the scheduled values and
2 multiplying those times eight with respect to any of the other
3 disease categories for comparison to the pre-bankruptcy
4 settlement values in Libby?

5 A Yes, we did for each disease. And I wanted to be specific
6 with regard to what the calculation was. It just seemed to me
7 more useful, but yes we did it for each disease. But for
8 non-malignants there's a problem because, you know, again, we
9 don't know the severity of the non-malignant claim. What the
10 settlements.

11 Q With respect to the non-malignants, you looked at the
12 pre-bankruptcy settlement values in Libby and determined that
13 on average if claimants got the 50,000 scheduled value under
14 Category 4B and that was multiplied times eight, that would
15 approximate the average settlement value for non-malignant
16 claims in Libby, right?

17 A If it --

18 MR. BERNICK: I'm sorry, non-malignant, severe
19 pleural disease?

20 MR. KOVACICH: Is that an objection?

21 MR. BERNICK: Yes. It's ambiguous.

22 THE COURT: It's sustained.

23 Q Dr. Peterson, the process that you were describing in your
24 comparison of values under the TDP and, in particular, the
25 extraordinary claims values, with the multipliers, your

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1 comparison of that with the pre-bankruptcy claims in Libby, you
2 described reviewing data on the non-malignant settlements in
3 Libby, right?

4 A We had a list of -- we had Grace data on the one hand,
5 which identified Libby claims, and then we had a list of claims
6 that Mr. Cohn provided us with of Libby claims. They were for
7 the most part, the same, although there are four more claims in
8 the Grace data, that are identified as Libby claimants, so
9 there is some difference, but we looked at those claims on both
10 lists and did the analysis as I've described.

11 Q And the analysis that you've described involved looking at
12 the \$50,000 scheduled value for severe asbestosis or severe
13 pleural disease, multiplying it times eight and that figure was
14 approximately the same as the average settlement for all
15 non-malignant claims in Libby, right?

16 Q I can't say that --

17 MR. BERNICK: Objection to the form of the question.
18 It shouldn't be a trick here. I mean the 50,000 relates to a
19 certain category, but his question goes --

20 THE COURT: He's said it this time, severe asbestosis
21 and severe pleural disease. It's overruled.

22 MR. BERNICK: It's all non-malignant claims in Libby,
23 is the question.

24 THE WITNESS: I --

25 MR. LOCKWOOD: Excuse me, Your Honor. There are two

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1 different averages that Mr. Bernick is referring to. There's
2 all non-malignant claims in Libby, that's one average, there's
3 all severe impaired, non-malignant claims in Libby, that's a
4 different average. And it's ambiguous in the question, which
5 set of averages he's asking about.

6 THE COURT: All right, I'm sorry. I understood the
7 question to be the \$50,000 severe asbestosis and severe pleural
8 disease. If there's something other than that, can you please
9 restate the question and, perhaps, just limit it to one of the
10 categories at a time and then we won't have this objection.

11 Q Dr. Peterson, did you rely on the settlement values that
12 Mr. Cohn provided to you, that you've described in your
13 testimony, with respect to your conclusion that the eight times
14 multiplier was appropriate for the non-malignant claims under
15 the TDP?

16 MR. BERNICK: Objection.

17 MR. LOCKWOOD: Objection. It's still ambiguous to
18 which non-malignant claims under the TDP he's talking about and
19 which settlement numbers he got from Mr. Cohn, which include
20 different kinds of settlement values.

21 MR. KOVACICH: I'm attempting to lay a foundation as
22 to which settlement values he considered, Your Honor, and I'm
23 talking about all of the non-malignant claims.

24 MR. LOCKWOOD: If this is foundational, I'll withdraw
25 the objection.

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1 THE COURT: Okay. So, the question is, whether this
2 witness relied on all the data provided as to all non-malignant
3 claims by Mr. Cohn, in establishing the TDP values.

4 MR. KOVACICH: I'll withdraw the question and start
5 over.

6 Q Dr. Peterson, you've testified that you reviewed
7 settlement data provided by Mr. Cohn, right?

8 A We used Mr. Cohn's list of settlements in some of the work
9 we did, yes. But, I need to add that we also used the Grace
10 database, which was, for the most part, the same as Mr. Cohn's
11 list, but there were a couple of additional claims in the Grace
12 database.

13 MR. FINCH: Mr. Kovacich, are you --

14 MS. HELLER: You have to use a microphone, Mr.
15 Lockwood.

16 MR. FINCH: Mr. Kovacich, the document in your hand
17 is in Dr. Peterson's book, it's under Exhibit 152.

18 MR. KOVACICH: Thank you.

19 Q Dr. Peterson, apparently the document I'm attempting to
20 find is in your book under Exhibit 152.

21 A Oh, I'm sorry, I apologize, I had the wrong source. This
22 is the document and it was from Mr. Heberling, I apologize. I
23 had the wrong --

24 Q Do you recognize Exhibit 152?

25 A Yes, I do.

1 Q And this is the information that was provided to you by
2 the Libby claimants counsel regarding their historic
3 settlements in Libby, right?

4 A Yes.

5 Q You did review this information to verify that it was
6 accurate in comparison to the Grace claims database, right?

7 A Yes. We were able to validate, we were able to compare
8 the numbers to what's in the Grace database. There were two
9 more mesothelioma claims in the Grace database. And there were
10 two more non-malignant claims. Actually, I'm a bit concerned
11 here. This -- I believe there are more settlements than these,
12 there's more than just a difference of four in the Grace
13 database. They have a larger number of mesotheliomas, they had
14 seven for example, not three.

15 Q Okay. We have two different categories of non-malignant
16 claims listed on this document, right?

17 A Yes.

18 Q There's three settlements that were classified on here as
19 unimpaired, right?

20 A That's how they were classified.

21 MR. BERNICK: I'm sorry, classified by Mr. Heberling?

22 THE WITNESS: That's how I understood the question.

23 MR. BERNICK: Yes, okay.

24 Q And 28 for which the document here states impaired, right?

25 A That's what Mr. Heberling said, yes.

1 Q And the process that you described earlier where you
2 compared the \$50,000 severe pleural scheduled value with an
3 eight times multiplier to non-malignant settlement values in
4 Libby, you took the \$50,000 times eight, came up with 400,000
5 and that approximated the average as set forth for the
6 impaired, non-malignant claims on this document, right?

7 A Yes. But I think we also looked at it on a case by case
8 basis.

9 Q When did you look at it on a case by case basis?

10 A At the same -- well all you have to do is compare \$400,000
11 to these listed numbers.

12 Q Did you compare any of the settlements set forth on this
13 document, or any other settlements from Libby, for that matter,
14 with scheduled values for any disease category other than
15 severe pleural?

16 A I think we did it for each of the categories, is my
17 recollection. The unimpaireds, I'm not sure we knew how to
18 deal with it, we didn't know which category it would fit in.

19 Q Dr. Peterson, you don't know what any of these people
20 would -- which disease category any of these people would
21 qualify for under the Grace TDP, isn't that true?

22 MR. FINCH: Objection. None of these people are
23 going to qualify for anything under the Grace TDP because
24 they've already gotten paid by Grace.

25 THE COURT: That's sustained.

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1 Q Dr. Peterson, when you did your analysis comparing the
2 values that would be paid under the TDP for current and future
3 claims, when you compared that with the historic settlements in
4 Libby, did you give any consideration to the nature of the
5 non-malignant disease of those people who had settled?

6 A Other than the representation made by Mr. Heberling, in
7 this letter and list, we had no data on the severity of
8 disease, non-malignant diseases or what categories they might
9 have fit in if they were to be reviewed under the TDP.

10 Q And, Mr. Heberling didn't attempt to give you the kind of
11 data that could be used to classify these people under the
12 different categories in the TDP, did he?

13 A There was no offer to do so.

14 Q And so, for example, if you look at the entry for J.
15 Swennes (phonetic), fourth from the top under 28 impaired, that
16 reflects he received a settlement of \$580,000, right?

17 A Yes.

18 Q But you don't know whether Mr. Swennes was, in fact, a
19 severe pleural as characterized by the TDP or whether he was --
20 would have fallen under some lower category with a scheduled
21 value of 2500 bucks.

22 MR. FINCH: Objection. Mr. Swennes wouldn't fall
23 under any category in the TDP, he's already gotten money from
24 Grace.

25 MR. KOVACICH: Your Honor, the testimony here is that

1 this eight times multiplier is reasonable because it would
2 allow claimants qualifying for the \$50,000 severe pleural
3 category to achieve values consistent with the pre-bankruptcy
4 settlement average of \$400,000 and the problem with that is,
5 almost none of these people would have had claims that would
6 have fallen under the severe pleural category, their scheduled
7 values would be 2500, 7500 and the like. Multiplied times
8 eight, it doesn't come anywhere close to the settlements that
9 they achieved with Grace prior to the bankruptcy.

10 MR. BERNICK: Your Honor, I really think this may be
11 another miscommunication point. I don't believe anybody has
12 made the representation that anybody valued those 28 cases and
13 said, gee, they are -- fall into some category and, therefore,
14 we're going to achieve parity with them. It's not the witness'
15 testimony, that's not the testimony of anybody. It is a
16 question of what benchmark was represented to apply to people
17 who had a severe problem and that was taken at face value.

18 I don't think there's been any testimony that these
19 people were somehow assessed on the facts and were used as
20 individuals as opposed to an experience that was being
21 represented by counsel.

22 MR. KOVACICH: If I may respond, Your Honor. I
23 disagree. The witness testified that he believes the eight
24 times multiplier is reasonable because he compared the 50,000
25 scheduled value times eight with the settlement average for

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1 non-malignant claims in Libby prior to the bankruptcy.

2 MR. FINCH: Yes, yes.

3 MR. LOCKWOOD: He also testified that you had
4 individual values on a case by case --

5 MS. HELLER: Mr. Lockwood, you have to use the
6 microphone.

7 MR. LOCKWOOD: Your Honor, he also testified that you
8 had to value -- that each case was valued individually and
9 separately and that these were averages, and counsel is now
10 testifying up there, that every case on this list that his
11 co-counsel gave to Mr. Peterson, had certain characteristics.
12 No such representation was made in the letter to Mr. Peterson.
13 No request to Mr. Peterson was made that he go individually and
14 look at the files, he's just testifying and he's asking you on
15 the basis of his testimony to instruct Mr. Peterson to answer
16 differently.

17 THE COURT: I'm not instructing Dr. Peterson to
18 answer differently. He's answering the questions as he
19 understands them in the fashion that he used the data and my
20 understanding and Dr. Peterson, if I'm incorrect please correct
21 me is, that you did with respect to this list, which is the
22 second page of Exhibit 152, the settlement data provided to you
23 by Mr. Heberling, in the 28 impaired category, you looked at
24 what the average is that's calculated here, it's slightly over
25 \$419,000, did the math when you timesed the \$50,000 in the TDP

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1 for that particular category that you were looking at at the
2 time, multiplied it by eight, came up with \$400,000 and decided
3 that that was roughly equivalent, using a rough justice
4 standard in that capacity. That was step one.

5 THE WITNESS: I think that was a great summary.

6 THE COURT: All right. And step two was, you looked
7 at the numbers that are stated and, again, just looking at this
8 28 impaireds, for F. Alsbury (phonetic) the first one, \$440,000
9 and made your own determination that 400,000 was roughly
10 equivalent to 440,000. And for the next one, J -- I think
11 that's Sallin that is listed at 375,000, that 400,000 was
12 roughly equivalent to 375,000. And so on down the list, with
13 some exceptions that are obvious outliers to that \$400,000.

14 THE WITNESS: I would accept that, too.

15 THE COURT: Okay. I understand the witness'
16 testimony. I don't think that what you're asking, what you are
17 suggesting, is what the witness did. If you want to try it
18 again with this witness to see if there was more to it, go
19 ahead.

20 Q Just a simple point. You can't compare these settlement
21 values with the extraordinary claims treatment under the TDP
22 because you don't have any idea what category these people
23 would have fallen under, isn't that true?

24 A Of course, not. I don't know what the details of these
25 claims are and we don't know how the trust is going to

1 implement the individual review for this category. There's a
2 lot of things we can't say for sure. That's why you use
3 averages in these kinds of things, because it's inherent
4 imprecision and that's why you also have to look at the
5 multiple objectives of the trust. There are other
6 considerations that have to be made in constructing a document
7 and a process as complex as this, not simply whether you can
8 nail every number exactly.

9 Q Did you do any empirical analysis to compare how the
10 extraordinary claims treatment would apply to categories such
11 as Level 3 under the non-malignant categories? For example,
12 did you -- the Level 3 scheduled value, I believe is \$7500, is
13 that right?

14 A That's correct, yes.

15 Q With an eight times multiplier, that would allow for
16 extraordinary claims treatment of --

17 A Sixty.

18 Q 60,000. You didn't do any empirical analysis to determine
19 whether 60,000 was anywhere close to what claimants in Libby,
20 with that type of disease, were settling the claims for with
21 Grace prior to the bankruptcy, did you?

22 A There really isn't an empirical analysis to be done. I
23 mean, I think I did the multiplication and I compared these
24 with what eight times the values for any of the non-malignant
25 categories were and it's pretty obvious, there's no -- it's not

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1 as much empirical, it's just a calculation. Yeah, I looked at
2 that.

3 Q I guess I'm confused. How did you look at that when you
4 didn't have information about which category these claimants
5 would have fallen in?

6 A Because this whole analysis is a what if. We would call
7 it a sensitivity analysis. If all of these claims were in
8 Category 4A or 4B, then they would get -- and they are
9 extraordinary claims, they would get \$400,000. If all of these
10 claims were in Category 3 and an extraordinary claim, then
11 they'd get \$60,000. So, it's a what if, okay? If this is what
12 the facts are it has a certain comparative. If -- all 4A and B
13 has certain comparisons. If it's a different category, it has
14 a different comparison. That's just -- that's a way of looking
15 at kind of what -- when you're uncertain about something that's
16 the way to look at something.

17 Q And if almost all of them are disqualified for one reason
18 or another, from Level 4B, then what the values provided by the
19 TDP will approximate as -- will not be similar to what these
20 claims were settled for prior to the bankruptcy.

21 MR. BERNICK: Objection.

22 MR. FINCH: Objection.

23 MR. BERNICK: Objection to the form of the question.

24 THE COURT: This is an expert, he can answer the
25 question. Go ahead, Dr. Peterson.

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1 THE WITNESS: If the -- these were sent to me as
2 impaired claims, the representation here and elsewhere is that
3 these are very seriously sick individuals. If they are that
4 sick, my assumption is that they will probably -- it's a
5 different assumption than you're making, but my assumption is,
6 they would probably qualify under 4A or 4B, and I hope they do.
7 And, if so, they'll get \$400,000. If they're not that sick,
8 then I don't think they should get \$400,000. They may have
9 gotten more historically, but you've got to have some sense of
10 what's the -- if you overpay some claimants, you're underpaying
11 everyone else. You have to have some balance with regard to --
12 in constructing a document as complex with this, that has to
13 deal with so many individual cases. You have to do rough
14 justice.

15 Q And as part of that rough justice, if that means that you
16 pay substantially less to claimants in this bankruptcy than
17 what they would have achieved in the tort system, then that's
18 acceptable to you?

19 MR. FINCH: Objection, Your Honor. Objection to
20 form. What they would have achieved in the tort system is --
21 we're here on this TDP and these values and this is a bunch of
22 historically settled cases that aren't ever going to go through
23 the TDP process.

24 THE COURT: This witness has already explained that
25 the vagaries of the tort system did not afford a precise

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1 analysis of what any claimant would have received when, in
2 fact, they're not in the tort system. So, I think the question
3 presumes a fact that's not in evidence. The objection is
4 sustained.

5 Q Dr. Peterson, did you do any comparison of the overall
6 settlement averages for Libby claims versus non-Libby claims,
7 as part of your evaluation?

8 A You mean the -- across all diseases? No, I didn't, that's
9 a meaningless analysis.

10 Q I have here a document that's marked Exhibit, Plaintiffs'
11 Exhibit 63.

12 MR. FINCH: Can I get a copy, counsel?

13 THE COURT: Is this in the binders somewhere? Is it
14 in the binders somewhere?

15 MR. KOVACICH: It should be, Pages 1 through -- it
16 should be 26, I included Page 27.

17 THE COURT: Okay. Thank you.

18 Q Have you ever seen this document, Dr. Peterson?

19 A I have seen some of the monthly asbestos litigation
20 summaries. I may have seen them all, I don't know. I can't
21 tell you that I've seen this particular one.

22 Q Did you see any of the monthly litigation summaries that
23 provided a breakdown of settlement values for different types
24 of claims including claims by Libby employees?

25 A I don't recall. It's been a long time since I looked at

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1 anything like this.

2 Q If you could look at Page 12 of Exhibit 63.

3 A Bates number?

4 MR. FINCH: 91-1625.

5 THE WITNESS: 91-1625 with a 12 in the lower right,
6 okay. I see that page.

7 Q At the bottom of the page, there's a table that sets forth
8 settlements for Libby employees and various other types of
9 claimants, do you see that?

10 A I do.

11 Q Have you ever seen --

12 A I'm sorry, which part of the page, the bottom, okay.

13 Q Last table on the page.

14 A Yes.

15 Q Have you ever seen those figures before?

16 A I have pretty good eyes for reading small material, but
17 this taxes me.

18 THE COURT: Likewise. I can't make out a thing, it
19 looks like chicken scratch, sorry.

20 THE WITNESS: I can't tell you what these numbers
21 are.

22 THE COURT: Much better.

23 MR. FINCH: There you go.

24 THE WITNESS: Thank you.

25 Q Dr. Peterson, have you ever seen the data that's reflected

1 on the last table on that page?

2 A I don't know.

3 Q Do you see the last column represents the cumulative
4 settlement averages for all of those categories of claimants?

5 A The last column?

6 MR. FINCH: Objection, lack of foundation. Dr.
7 Peterson has testified he doesn't recall if he's seen this
8 document. There's been no foundation laid that he either
9 created the document, knows what the document reflects or had
10 anything to do with it, or that it played any role in his
11 analysis of any of the work that he did in this case. He
12 testified that he reviewed summaries like this as part of his
13 work but I don't think they've laid the foundation yet, that
14 they can start asking him about what this table means.

15 THE COURT: That's sustained.

16 Q Dr. Peterson, did anyone from Grace ever or the ACC
17 provide data to you showing what the average settlement amounts
18 were for Libby claimants, Libby employees versus other Grace
19 employees, non-Grace employees, construction workers and the
20 like?

21 A Well, as I've testified, I've seen some of the monthly
22 settlements and I believe they're in there, but I thought it
23 was meaningless information. As I testified before, I don't
24 think it tells me anything.

25 Q Do you have any recollection of what the comparison was

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1 between the average settlement for a Libby employee and the
2 average settlement for other claimants?

3 A Well, since I thought it was a meaningless number, I
4 didn't retain it.

5 Q And you have no idea whether it is even on the same order
6 of magnitude as an eight times multiplier?

7 A It has -- it means nothing. I don't know what it is. I
8 don't recall them. I'll be happy to explain why it means
9 nothing if you want.

10 MR. BERNICK: Bob, how much more time do you need?

11 MR. KOVACICH: We'll wrap it up here pretty quick.

12 MR. BERNICK: Pretty quick.

13 Q Dr. Peterson, do you recall that Jennifer Biggs did an
14 estimation of Grace's liability on behalf of the future
15 claimants' representative in this case?

16 A Yes.

17 Q Did you review her work?

18 A Some of it.

19 Q Do you recall that she -- did you consider her work for
20 purposes of the work that you did, either in the estimation or
21 for purposes of the confirmation?

22 A I don't think so.

23 Q Do you recall that she did an estimation of future
24 liability that was specific to Libby?

25 MR. GUY: Objection, Your Honor, it's beyond the

1 scope and he just said he didn't consider it, so I don't see
2 what relevance it has.

3 AUDIO OPERATOR: Mr. Guy, I cannot hear you.

4 MR. GUY: I'm sorry. Jonathan Guy for the FCL. It's
5 beyond the scope and the witness just testified that he didn't
6 consider it so I don't see what relevance it has.

7 THE COURT: Well, he testified that he doesn't think
8 so, so I'll permit a little bit of this to see whether, in
9 fact, he did or does recall anything.

10 THE WITNESS: I'm sorry, what's your question?

11 Q Do you recall that Jennifer Biggs did an estimation with
12 specific reference to future claims to be expected in Libby,
13 Montana?

14 A I believe I recall that she did it but I didn't -- I can't
15 recall anything about it. I didn't rely upon it in any way.

16 Q And you didn't give it any consideration when you were
17 attempting to determine how Libby claims should be treated
18 versus the claims of others in this bankruptcy?

19 A I didn't rely on it in any way.

20 Q And you personally didn't do any estimation with specific
21 reference to Libby as opposed to other claimants, is that true?

22 A Estimation of what, the average value? No.

23 Q Or the extent of future liability.

24 MR. BERNICK: We're talking about a formal estimate?

25 Objection to form.

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1 A We made calculations based on hypotheticals as to what the
2 total liability might be involving the Libby claims under the
3 TDP, yes.

4 UNIDENTIFIED MALE SPEAKER: Your Honor, we're having
5 difficulty hearing over here again.

6 THE COURT: Oh, I'm sorry. Dr. Peterson, if you
7 could stay closer to the microphone. Would you repeat your
8 answer for them please?

9 THE WITNESS: We didn't do a formal analysis. We did
10 some calculations based on varying assumptions as to what the
11 range of payments might be, obligations and payments under the
12 TDP for the Libby claimants, yes.

13 Q Was that part of the report that you prepared for the
14 estimation case?

15 A No.

16 Q In what context did you do that work?

17 A We just wanted to know what the order of magnitude of
18 liability might be. Part, I think, was the question is how
19 significantly would it impact the payment percentage if it all.
20 I think that was one of the -- but it was exploratory. It
21 wasn't done for any formal objective.

22 Q And you didn't do -- you didn't use any of that work for
23 purposes of developing the extraordinary claims values under
24 the TDP or otherwise determining how to treat Libby claims
25 under the TDP, is that accurate?

1 A No, because it's not relevant to that.

2 Q The projected future value of claims in Libby is not
3 relevant to the treatment of those claims under the TDP?

4 A No, if they're -- you know, if -- no, it's not relevant.

5 Q Just briefly I want to ask about your testimony about the
6 factors that you expected to cause an increase in Grace's
7 liability since 2001. Do you recall that testimony?

8 A Yes.

9 Q One of the factors that you identified was bad publicity
10 about Libby, Montana?

11 A Yes.

12 Q Did I understand your testimony that it's your opinion
13 that bad publicity in Libby, Montana, would cause an increase
14 in claim values everywhere but Libby, Montana?

15 A I think it had already raised the values. That's what my
16 testimony was. Bad publicity did raise the values in Libby and
17 I think it raised it enormously.

18 Q On what do you base that testimony?

19 A Just knowledge of when that information was distributed,
20 knowledge about how juries and people react to stories of
21 extremely bad behavior on the part of corporations, being
22 victimized, having studied asbestos and other litigations for
23 25 years. I get some -- I have some sense of what really makes
24 people angry and what the implications are of that for how much
25 a defendant has to pay. It's not a surprising phenomenon.

1 Q Do you have any knowledge about -- as to where the Libby
2 cases were actually tried or venued before they were settled?

3 A I recall -- well, they're in Montana. The publicity in
4 Montana was widespread. I don't think they were -- I know they
5 were in Libby. They may have been in Butte, I'm not sure. I
6 knew of it. I don't recall.

7 Q Do you have any specific information that you can provide
8 to support that opinion as to what publicity was distributed in
9 any part of Montana prior to the widely-disseminated publicity
10 that you're talking about everywhere else?

11 A I know that there were articles in the Seattle newspaper.
12 There were statements by people who were doing some of the
13 medical review studies. I don't know who entirely they were
14 disseminated to.

15 Q The articles that you're talking about in the Seattle
16 newspaper, that's the national media that you indicated would
17 cause claims to rise everywhere else, right?

18 A The Seattle paper is a regional newspaper. It's not
19 really a national newspaper. It has a national impact, perhaps
20 because other people pick it up. I can't tell you specifically
21 where the circulation of Post Intelligencer was.

22 Q And you can't tell us anything about how publicity prior
23 to the wave of national publicity about Libby had already
24 informed everyone in Montana about Grace's activities there?

25 MR. BERNICK: Object. The question now is -- counsel

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1 is testifying. And candidly, having studied the matter and
2 having been in Libby for all these years, there can't possibly
3 be a representation that the Seattle Post Intelligencer in 1999
4 was the first time that people in Libby knew about what was
5 going on in Libby. That is not a fair representation to the
6 Court.

7 THE COURT: Now you're testifying. Could we just --

8 MR. KOVACICH: The cases weren't even venued in Libby
9 for the most part.

10 THE COURT: Gentlemen, that doesn't mean that people
11 in Montana won't know about them. But I understand the point
12 you're making. I think the witness has tried to answer the
13 questions that you have asked him but I lost the last question
14 if it was a question. It sounded like a statement. I'm sorry,
15 could you re-ask it?

16 Q Dr. Peterson, you don't know anything about specific media
17 attention in Montana prior to the time frame where the national
18 media started distributing information about Grace's activities
19 in Libby, isn't that true?

20 A I think that's correct. By media you mean newspapers and
21 television and radio, and people like that?

22 Q By media I mean whatever media types you were referring to
23 in your report when you indicated that the negative publicity
24 about Libby would cause an increase in claim values everywhere
25 but Libby.

1 A Those media -- types of media I can't say specifically
2 what was included or not included or what other forms of
3 communications there were in Montana.

4 Q Dr. Peterson, you've also testified here today that the
5 average verdicts for non-Libby, non-malignant cases were higher
6 than the average verdicts for non-malignant cases in Libby, do
7 you recall that testimony?

8 A Yes.

9 Q When you prepared those numbers you didn't take into
10 account any of the defense verdicts that Grace had achieved in
11 non-malignant cases, did you?

12 A It wasn't relevant to the issue I was looking at.

13 Q You did an analysis of the average verdicts in Grace cases
14 which included the defense verdicts for purposes of your
15 estimation work, right?

16 A Not for purposes of attempting to understand the values of
17 claims when they're paid. All of this -- everything we've been
18 talking about is what's the value of a claim that has value,
19 not what's the value of the claims that don't have value.

20 Q I'm sorry, I didn't ask you what the purpose of that
21 analysis was, just whether you agree with me that for the work
22 that you did in the estimation you prepared an average of the
23 verdicts including the defense verdicts.

24 A We did present that.

25 Q And you would agree that Grace actually won the majority

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1 of the asbestos injury cases that were tried to verdict against
2 it, right?

3 A I don't recall that. Actually, I think they lost the
4 majority of the verdicts against them.

5 Q I'm sorry, did I misspeak and say they --

6 A You said that Grace won. I think they lost 57 percent of
7 them. No, I'm not sure. It's in my report. I just -- I can't
8 recall it.

9 Q If you could look at Page 96 of your estimation report. I
10 think you have it.

11 THE COURT: What's the exhibit number please?

12 MR. FINCH: 199, Your Honor.

13 A I have that. Page -- I'm sorry, which -- this is --

14 Q The average --

15 MR. FINCH: What page are you looking at, Mr.
16 Kovacich?

17 MR. KOVACICH: I'm looking at Page 96 right now.

18 Q The average verdict for non-malignant claims taken into
19 account, Grace's defense verdict was actually \$222,000, right?

20 A There's nothing on my Page 96 that says that.

21 MR. FINCH: I think it's Page 97 in the official
22 exhibit marked.

23 THE WITNESS: Thank you.

24 Q Perhaps I have a prior version of the report. You see the
25 discussion in your report about the average verdicts?

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1 A Yes, I do, in the second paragraph on Page 97.

2 Q And you would agree with me that the average verdict for a
3 non-malignant claim was \$222,000 when you take into account all
4 of the defense verdicts that Grace achieved?

5 A Yes.

6 Q And you're aware that Grace didn't achieve any defense
7 verdicts in Libby cases, right?

8 A I am not aware of that I don't think.

9 Q Where did you get the information that you considered to
10 evaluate these verdict amounts?

11 A There were data in the database. There was a list of
12 settlement -- of verdicts, rather, prepared by W.R. Grace.
13 There was attached to a document involving Steve Snyder, who's
14 -- and I don't recall the document or the context of it, but
15 there were --

16 MR. BERNICK: Your Honor, there are -- I'm sorry.

17 A -- a couple sources.

18 MR. BERNICK: We're now 12 minutes before six. We
19 are now one witness behind, but I'm more concerned about Dr.
20 Peterson being able to leave this evening. I know that Mr.
21 Finch probably has a very terse redirect. But could we inquire
22 about when this examination is going to be done so that we can
23 finish with Dr. Peterson?

24 THE COURT: How long will you be, Mr. Kovacich?

25 MR. KOVACICH: As soon as we're done talking about

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1 this. It should be just a few moments, Your Honor.

2 THE COURT: All right.

3 MR. KOVACICH: As soon as we're done talking about
4 this, it should be (indiscernible) everybody's eyes, worse than
5 the last time.

6 Q Do you recognize this, Dr. Peterson?

7 THE COURT: Can you identify what you've handed him?

8 MR. KOVACICH: It is a -- it was Exhibit 2 to Mr. J.
9 Hughes' deposition during the estimation case and it's a table
10 summarizing verdicts in asbestos bodily injury cases against
11 W.R. Grace.

12 A I don't recall if this was the document that we used or
13 not.

14 Q If you could look at the overhead sheet that had your
15 comparison of the Libby verdicts and non-Libby verdicts?

16 A I'm sorry, you want me to look at what? I don't
17 understand what you're referring to.

18 Q The table from your report that provided a comparison of
19 Libby verdicts and non-Libby verdicts.

20 MR. BERNICK: Last one.

21 THE WITNESS: Oh, the demonstrative, you're talking
22 about?

23 MR. BERNICK: Yeah, demonstrative.

24 THE WITNESS: Thank you. I have that.

25 MR. BERNICK: Page 62.

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1 Q See that the rather large non-malignant verdict
2 amounts that you set forth on the table as being under appeal
3 are reported on this document Exhibit 2 to the Hughes
4 deposition?

5 A It looks like that, yes.

6 Q Those cases appear to all have been tried as part of the
7 same matter in Texas with a verdict on the same date?

8 A I'd have to look more clearly at this document.

9 Q Your own document has the same cause number for those
10 handful of cases, right?

11 MR. BERNICK: We'll stipulate that that is true as to
12 those last five cases, not as to the ones before it.

13 THE WITNESS: I will accept both of your
14 representations of that fact.

15 THE COURT: All right.

16 Q Did you compare -- as you've indicated in your materials,
17 those verdicts are under appeal, right?

18 A Yeah, it's my understanding, yes.

19 Q Did you compare those verdicts to the mesothelioma
20 verdicts against Grace in order to evaluate whether -- how they
21 compared to the historic meso verdicts?

22 A I don't recall making any other comparisons.

23 UNIDENTIFIED MALE SPEAKER: I'm sorry, Your Honor,
24 once again we can't hear over here. Could we hear that last
25 answer?

1 THE COURT: He said he doesn't recall doing that
2 comparison.

3 UNIDENTIFIED MALE SPEAKER: Thank you.

4 Q And you don't recall doing any comparison where you would
5 have counted the number of cases at any disease level -- strike
6 that. You didn't do any analysis where you looked at the
7 number of non-malignant cases where Grace achieved a defense
8 verdict for purposes of your comparison of verdicts inside and
9 outside Libby, right?

10 A I didn't since my objective was to see what was the
11 average amount of compensation paid in verdicts or what was the
12 amount of compensation paid in verdicts when plaintiffs were
13 successful. The idea is to what's -- it goes to what's the
14 value of a claim. The value of a claim is what a jury gives
15 it, what a settlement amount is. That isn't an issue and it
16 gets zero value. That's not an interesting question or it
17 wasn't related to anything that I was trying to do or look at.
18 It's irrelevant.

19 Q Did Grace give any consideration to its prospects for
20 achieving a defense verdict in cases when it evaluated those
21 cases for settlement?

22 A Did Grace take into account its chances of winning? Of
23 course it did. That's -- I'm not Grace and I wasn't doing an
24 analysis for that reason.

25 Q And you didn't do any analysis to consider Grace's

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1 prospects for defense verdicts inside and outside Libby for
2 purposes of your work in this case, right?

3 MR. LOCKWOOD: Objection, Your Honor. He would have
4 to speculate the merits of cases that the Heberling firm and
5 the Lewis firm would file in the future and whether they would
6 be dismissed. I mean --

7 THE COURT: That's sustained.

8 MR. KOVACICH: Your Honor, I'm finished.

9 THE COURT: Okay.

10 MR. FINCH: Brief redirect, Your Honor?

11 THE COURT: Yes, sir.

12 REDIRECT EXAMINATION

13 BY MR. FINCH:

14 Q Dr. Peterson, why do you use national values in the
15 estimates you provided for purposes of the TDP instead of local
16 values?

17 A Because the structure of the trust distribution procedures
18 are an attempt to have -- develop a plan that's applicable in
19 every state across the country and to treat people in a uniform
20 manner as well as they can and indeed that's an edict of
21 524(g). So you do that rather than creating a favorite son
22 analysis state-by-state. Moreover, you can't construct a TDP
23 that would have scheduled values and so on differently from
24 state-to-state. It would be unmanageable and it would promote
25 potentially abusive practices by some claimants.

1 Q You were shown this document, which is plan proponents 152
2 in your cross examination. Did the Libby -- first of all, does
3 the Grace database provide any information about the lung
4 function test scores or the level of impairment for any of the
5 non-malignant claims shown on this list?

6 A No.

7 Q Did the Libby claimants ever provide you with information
8 and ask you to analyze what level of lung function impairment
9 any of these people might have had on this list?

10 A No.

11 Q Did they ever describe to you what they meant by impaired
12 versus unimpaired?

13 A No.

14 Q You were asked some questions about Libby settlements
15 versus settlements outside of Libby and said it was a
16 meaningless comparison and I offered to tell Mr. Kovacich why
17 he didn't take you up on that. Why is that a meaningless
18 comparison?

19 A Well, it's a mere mixing of apples and oranges in doing
20 the calculation. The average payment settlement involves meso
21 and lung cancer and non-malignants and all these mixed together
22 and the distribution of those may -- they differ state-by-
23 state, location by location and when you try and sum -- by
24 being an employee or not. And when you compare -- if you want
25 to compare what's the relative amount of payments to people,

1 you have to do it at the level of the disease because now
2 you're dealing with like kinds of claims. But if you do it
3 across, you don't know what you're comparing.

4 Q The -- you were asked some questions about the future
5 value of Libby claims. Why is that not relevant to the work
6 you did for purposes of the TDP values?

7 A It's just not relevant. I mean the values that they get
8 or might get, get what they get. The idea is to be fair to
9 them. And if they get as much money as altogether that people
10 get in all other states and that's the right and fair thing to
11 do, then so be it.

12 Q Could you turn in your exhibit book to Exhibit 201,
13 specifically Page 9 of 201?

14 A Page 9?

15 Q Page 9 of Exhibit 201.

16 A Yes, I have that.

17 Q You were asked a question by Mr. Kovacich about the third
18 full paragraph, the sentence, "Libby plaintiffs often claim
19 much more serious non-malignant injuries than we have seen for
20 the nation as a whole." Do you recall that?

21 A Yes.

22 Q And your response was -- the next sentence answers that.
23 "We don't have the document in evidence." Can you just read
24 the next sentence?

25 A Can I read the two together?

1 Q Yes.

2 A "Libby plaintiffs often claim much more serious
3 non-malignant injuries than we have seen for the nation as a
4 whole. The higher values for exclusive exposures or more
5 serious non-malignant injuries will get greater compensation
6 under the TDP." The next sentence, "A claimant can get even
7 greater compensation if both applied to his or her claim."

8 MR. FINCH: Back to the ELMO.

9 Q These are some of the factors that you identified which
10 had driven up Grace's cost to resolve asbestos claims
11 historically before it went into bankruptcy?

12 A Yes.

13 Q As between these factors, which were more important in
14 your view?

15 A I think the first -- well, nationally I'd say the first is
16 the most important of them.

17 Q The co-defendant bankruptcies?

18 A The co-defendant bankruptcies, yes.

19 Q Can things happen in asbestos litigation that cause claim
20 values for particular types of claims to go down as well as go
21 up?

22 A Sure.

23 Q Has that happened in asbestos litigation to non-malignant
24 claims?

25 A I think so, non-malignant claims, for example.

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1 Q What kind of things would that include that could cause
2 claim values to go down as well as up? Excuse me, what kind of
3 things can cause claim values to go down?

4 A Within the same -- nationally you're talking about or in
5 --

6 Q Nationally.

7 A Well, if high jurisdiction cases are no longer able to --
8 if cases get removed from high jurisdiction cases and sent to
9 lower jurisdiction cases, that could affect the national
10 average. I think all of this increased skepticism and scrutiny
11 of non-malignant claims has driven down the values of
12 non-malignant claims. Those are two that come to mind.

13 Q Does docket congestion play a role in the value of claims?

14 A Oh, absolutely.

15 MR. KOVACICH: Objection. Leading.

16 A Yes, the ability --

17 THE COURT: It's sustained. Can you rephrase the --

18 Q Okay, is there anything else that plays a role in the --
19 that would cause a decline in the value of claims?

20 A Anything that would make it more difficult for claimants
21 to be able to get to trial would change it.

22 Q Such as?

23 A Docket.

24 Q Finally, Dr. Peterson, does the TDP provide a different
25 process for the Libby claimants for resolving their claims and

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1 having values apply to their claims and -- than for non-Libby
2 claimants?

3 THE COURT: I'm sorry, would you rephrase that? I
4 lost something.

5 MR. FINCH: Sure.

6 Q Does the TDP provide a different process for the Libby
7 claimants to resolve their claims than other claimants, or is
8 it the same process?

9 A It's the same process. There's the one issue with regard
10 to what kind -- how it shows the exposure, rather significant
11 occupational exposure. But the process itself is the same.
12 The values and benefits of the TDP are the same across the
13 country and in each state. The burdens and the limits, the
14 burdens and limits that I was asked about with Libby apply to
15 many more claims outside of Libby. It has a bind in limit to
16 the amount of money people get much more in places other than
17 Libby than at Libby.

18 Q This list of more than eight cases has a total of -- it
19 looks like there was a total of less than 40 historical Libby
20 settlements.

21 THE COURT: I'm sorry, what document number?

22 MR. FINCH: Document 152.

23 Q Twenty-eight plus three plus --

24 A That's why I'm concerned that this is a limited document
25 because our data shows that there were about 58 non-malignant

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1 settlements and seven mesos and that's more than are on here.
2 Those are data -- those are Libby claims identified in the W.R.
3 Grace database.

4 Q The Libby claimants assert that what makes them unique or
5 different is that they have fatal non-malignant diseases and
6 almost exclusive exposure to Grace asbestos. Were there
7 claimants outside of Libby that would have those kind of
8 characteristics as well based on your view of Grace's asbestos
9 litigation history?

10 A Oh yes, there are claimants outside of Libby that would
11 have fatal non-malignant diseases, extraordinarily serious
12 ones. There are claimants outside of Libby whose exposure was
13 solely to Grace or almost solely, and there are people that
14 have combinations of both. Again, those characteristics are
15 not unique to Libby.

16 MR. FINCH: Your Honor, with that, I have no further
17 redirect.

18 MR. BERNICK: If I could just spare the trouble of
19 communicating with Mr. Finch and ask a question of Dr.
20 Peterson? Dr. Peterson, in an answer you gave to Mr. Finch
21 regarding whether it was the same process at Libby -- the TDP
22 process would be the same at Libby as elsewhere, you made
23 mention of there being an issue with respect to exposure.

24 THE WITNESS: Yes.

25 MR. BERNICK: You remember that? Was that area of

1 the TDP more generous to Libby, less generous to Libby, the
2 same or what?

3 THE WITNESS: It makes it easier for the Libby cases
4 to qualify and in that sense, it's more generous.

5 MR. BERNICK: Thank you.

6 THE WITNESS: It's an attempt to recognize the
7 realities there but it gives the Libby claimants a benefit
8 that's similarly situated but I don't want to go there. It
9 gives them a benefit.

10 MR. BERNICK: Okay, thank you.

11 MR. FINCH: Your Honor, that's it.

12 THE COURT: All right.

13 MR. FINCH: Recross?

14 MR. KOVACICH: No recross.

15 THE COURT: You're excused, Dr. Peterson, thank you.

16 THE WITNESS: Thank you very much.

17 THE COURT: Mr. Bernick?

18 MR. BERNICK: I know that we're at six o'clock and
19 we're -- it's 6:05 so we're past our stay here. With respect
20 to tomorrow -- I'll just stay here. With respect to tomorrow,
21 the next witness is Mr. Hughes. We were supposed to try to get
22 to Mr. Hughes today. It didn't work out so we'll start with
23 Mr. Hughes tomorrow morning. After that, the -- I believe that
24 the next up are the Libby claimants' witnesses and there are a
25 couple of claimants that will implicate one of the motions that

1 we have. There's then Dr. Molgaard who implicates Daubert.

2 And then most critically for time planning purposes,
3 we have Dr. Whitehouse. Dr. Whitehouse, I think given where we
4 are today, is highly likely to testify tomorrow and maybe we'll
5 get through his direct examination, I don't know. I've been
6 told that Dr. Frank then needs to testify first thing on
7 Thursday morning no matter what else is going on and we're
8 prepared to certainly accommodate that.

9 The reason I flagged Dr. Whitehouse is that he is
10 probably of all those people the one, the scope of whose
11 testimony is most impacted by the motions that are pending. I
12 know that Your Honor will recall specifically the motion that
13 deals with the fact that his opinions formulated and expressed,
14 at least originally, were based upon the 1,800 and we don't
15 have the 1,800 and the whole question about whether he should
16 be permitted to testify to epidemiological matters. That would
17 have a very significant impact on the scope of his direct
18 examination as opposed to whether he testifies as a treating
19 physician although we have a motion on that as well.

20 I guess what I'm getting at is, I'm assuming that
21 Your Honor hasn't had a chance to go through those Whitehouse
22 motions.

23 THE COURT: I haven't seen any of the motions. Were
24 they --

25 MR. BERNICK: These are motions that were filed --

1 they are motions in limine.

2 THE COURT: Oh, the motions in limine.

3 MR. BERNICK: Yes, and --

4 THE COURT: Yes, I've seen -- I've seen -- I think
5 I've seen all the motions in limine unless something has been
6 filed in the last three days.

7 MR. BERNICK: Okay, so --

8 THE COURT: If it's been filed since Thursday night,
9 I'm not sure I would have seen them Friday. If anything was
10 filed since Thursday night, I haven't seen it.

11 MR. BERNICK: Okay. It might be helpful if we had
12 some indication when we start -- maybe when we start tomorrow
13 about what we're going to really be dealing with when it comes
14 to Dr. Whitehouse. It's kind of -- there's a very significant
15 difference between his offering general opinions and his
16 testifying as a treating physician. We also have not received,
17 at least so far to my knowledge, an identification of which
18 individuals -- we've asked repeatedly which individuals is Dr.
19 Whitehouse going to address. Out of all the different people,
20 I think he's been treating physician for, you know, 950 people
21 plus.

22 But we -- and we have, of course, all kinds of
23 motions that relate to whether they should have any. But we
24 still don't even know who he's going to testify to as a
25 treating physician and we're now less than -- I guess we're 18

1 hours away from his appearance. So right now I don't know what
2 Dr. Whitehouse is going to say as a treating physician. We
3 don't have an expert report. We don't have an identification
4 of individuals. I don't know if he's going to be permitted to
5 testify regarding epidemiological matters. So he is something
6 of a major cipher here.

7 THE COURT: Well, we can start with arguments in the
8 morning if that's what you want to do or you can wait until
9 he's called and make your objections and give me the documents.
10 I think what would be helpful is if someone can give me a list
11 of where on the docket these exhibit numbers are unless, Mona,
12 have you pulled them while we've been in here, the motions in
13 limine?

14 MR. BERNICK: Yeah, and they're also in that little
15 chart --

16 THE COURT: Oh, were those --

17 MR. BERNICK: -- the dockets lists, that little chart
18 that we gave you this morning I think should list the docket
19 numbers for the different motions.

20 THE COURT: Well, that chart has disappeared.

21 MR. BERNICK: Well, we'll give you another one.

22 MR. FINCH: Your Honor, in addition to the --

23 THE COURT: Just a second. Thank you. All right,
24 they have the exhibit numbers on, so I'll take a look at these
25 things this evening.

1 MR. LEWIS: Your Honor, the Libby claimants have
2 something we should advise counsel about. We are unable to get
3 --

4 AUDIO OPERATOR: Please turn on your microphone.

5 MR. LEWIS: I'm sorry. It says it's on.

6 THE COURT: Yes, they always are green but that
7 doesn't necessarily mean they're on.

8 MR. LEWIS: Oh, I got it. That's better. I
9 apologize. My voice is a little rough so I'll speak very
10 slowly. We have been unable to get --

11 THE COURT: Can you back up? You're too close to the
12 microphone. Sorry. Ten inches it says. There's a sign there.

13 MR. LEWIS: You just can't -- you can't teach old
14 dogs new tricks.

15 MR. BERNICK: He says this with a smile. I mean you
16 know.

17 MR. LEWIS: Anyway, Your Honor, we are unable to get
18 all of the Libby witnesses that we anticipated bringing to
19 trial here. One of them, Norita Skramstad's son died last week
20 and she's not able to appear. One of them was Mr. Schnetter
21 (phonetic). He had an emergency, very serious emergency health
22 problem in his family. He could not be deposed so we are not
23 going to proffer him. We only have two witnesses. One of them
24 is Mr. Tom who will not be testifying about his own disease.
25 He will be testifying about -- he'll be providing foundation

1 for photographs if the Court allows them. Excuse me, you're
2 smiling. Is there a problem over there, sir?

3 MR. BERNICK: No, I'm just charmed as always. I
4 mean, really, it's --

5 MR. LEWIS: I mean I'm just -- I've told some of the
6 other counsel but I haven't told everybody. So we're going to
7 have -- Mr. Tom is just going to testify to lay a foundation
8 for some photographs we'd like to get in which actually shows
9 the Libby premises. And I don't know if the Court's going to
10 allow that or not. The Court has made no indication of that.
11 Is there a pending motion?

12 MR. BERNICK: There's a pending motion regarding the
13 relevance of working conditions.

14 MR. LEWIS: Right.

15 MR. BERNICK: And Your Honor ruled with regard to Dr.
16 Spear's testimony on that subject and we would think that that
17 same ruling would be applicable to Mr. Tom, that is, that
18 working conditions really are not at issue here. They don't go
19 to an issue here.

20 MR. LEWIS: That may be true but there's been a lot
21 of testimony about exposure and probably Mr. Tom knows more
22 about exposure in Libby than any witness that's testified.

23 MR. BERNICK: I doubt that. That's really an area
24 for expert testimony.

25 MR. LEWIS: Well, anyway --

1 MR. LOCKWOOD: Well, wait a minute. The TDP provides
2 that the Libby claimants don't have to prove exposure so why on
3 earth would we --

4 THE COURT: I think that's the point. Anyone who is
5 living --

6 MR. LEWIS: And I am asking in the nature of an
7 advisory on that issue. I'd like to get that resolved. If
8 these people are not going to be allowed to testify, let's send
9 them home. The other man is Mr. Swennes who would testify as
10 to what his settlement value -- settlement was. That's in
11 evidence. That came in today. Perhaps we don't even need to
12 call him. And we don't want to take up the Court's time
13 unnecessarily. And even if we do call these two witnesses and
14 they're allowed, it's not going to be two and a half hours.
15 It's going to be about 20 minutes of testimony. And I just
16 want to alert the Court to that.

17 MR. BERNICK: What -- could we then get the same --
18 well, that then leaves Mr. -- Dr. Molgaard would be next and
19 then we have -- then we do have the issue with respect to
20 Whitehouse and the question that I posed with respect to Dr.
21 Whitehouse is a treating versus epi. On the treating physician
22 -- as a treating physician, who's he going to talk about? We
23 have no idea. He's seen 950 people. Who is he going to talk
24 about?

25 THE COURT: Well, I don't think a treating physician

1 in that sense has to provide an expert report. Obviously,
2 they're doctors and they're are experts in that sense. But
3 nonetheless, I think the issue of an expert report is not
4 really relevant. They're testifying, I think in this sense,
5 more like either a lay witness or a fact witness who has dealt
6 with the plaintiff.

7 But I'm still not certain that I understand what the
8 relevance will be as to any specific claimants' medical history
9 or condition. So that's what I am still at a loss for. I
10 provided some discovery to see whether there was something that
11 would come out with respect to relevance but I still don't know
12 what that is.

13 MR. HEBERLING: Your Honor, we have provided the plan
14 proponents with an exhibit called, "Settled and Non-Settled
15 Cases." These are -- the non-settled cases are individuals we
16 listed for deposition last May. The Court preferred that we
17 not depose them but rather have the doctor talk about the
18 conditions and what categories of the TDP these people fall in.
19 That is the extent of the testimony. We gave them the chart
20 two, three weeks ago and so we wanted -- he will be talking
21 about those people and the settled claims, what category they
22 fall in and this is mechanical through the TDPs, following the
23 lung function test numbers. We have an exhibit which covers it
24 all. Hopefully that won't take too long unless he has to go
25 through each one.

1 And then also we will probably show a couple of rapid
2 progression cases. And I won't -- we have an issue also as to
3 whether we use numbers rather than names. But the rapid
4 progression cases that were disclosed in December of '08, they
5 know who those people are. He's been deposed on them.

6 THE COURT: Well, with respect to the use of the
7 numbers as opposed to names, if the claimants are actually
8 putting their own medical history at issue -- because to the
9 extent that Dr. Whitehouse is going to, or they, whoever it is
10 who's called, are going to opine that they belong in a
11 particular settlement category, number one, I don't know that
12 the documentation issues as to the trust are done so I think
13 it's -- I'm just not sure how anyone at this stage without
14 filing the claim that the trust is going to require be filed,
15 will be able to say we belong in category X.

16 But to the extent that you feel somebody has to
17 explain that, from my point of view, I'm not sure that the
18 individual witness can make that determination because it's the
19 treating physician who says you've got a disease that is this
20 disease. The plaintiff may know how they feel but they're not
21 the experts to classify the disease.

22 MR. HEBERLING: Right. I was referring to the
23 treating physician testimony and we just go pass/fail on these
24 lung function test numbers and blunting and so forth and that's
25 it. We're not going into the medical history.

1 MR. BERNICK: That's the whole problem. First of
2 all, we put on the screen --

3 THE COURT: I can't read it. I'm sorry.

4 MR. BERNICK: Okay well, that's fine. I'll pull it
5 up a little bit. It is small. This effectively will give it
6 -- it is 19 people -- chart of settled/non-settled malignant,
7 asbestos-related disease cases. There are 19 of them. Now, if
8 he testifies as a treating physician, that's one thing. I
9 don't know that his testimony as a treating physician is really
10 why they're calling him. It sounds like they're not. What
11 they're saying is they want to have him go through this chart
12 and then tell the Court whether or not these people will, in
13 fact, qualify under the TDP or not. In order to cross examine
14 him on that subject, we need to get into those files.

15 THE COURT: Yes, I think you do.

16 MR. BERNICK: And so we need to have the files for
17 those people. We also don't know what his statement regarding
18 that is. The testimony about how the TDP will apply to them is
19 not testimony as a treating physician. It's not fact
20 testimony. It's essentially his contention about how he
21 believes the TDP should apply to these people. We have no
22 expert report on that, none. So as I sit here right now I
23 don't have a clue about what Dr. Whitehouse is going to say,
24 will happen insofar as the application of the TDP people -- TDP
25 to these people will work, and I certainly don't have the

1 ability to somehow muster 19 files and be in a position to
2 cross examine Dr. Whitehouse.

3 I'll further note that we have settled claims -- with
4 respect to settled claims, there are issues about whether we
5 can even discuss the settlements because the settlements have
6 confidentiality provisions that are binding on Grace. We can't
7 discuss those settlements and those are provisions that are
8 binding with respect to the claimant. They can't be waived by
9 counsel. They can't waived by anybody in this court. I don't
10 know how we even talk about them.

11 With respect to the non-settled, non-malignant ARD
12 cases, we're now being told for the first time that this
13 exercise will take place. If, in fact, it takes place, we are
14 in a position where how do I bring out on cross examination the
15 limitations of these 18 people? These 18 people were picked
16 how?

17 And then with respect to progression, there was a
18 statement about progression. The progression cases. The
19 progression cases are the subject of an article, 123 people.
20 That's published. We know about that. There's then a separate
21 list of progression cases that's not the subject of any
22 article. It's just 22 cases that are out there. So we have
23 this profusion of individual cases that are coming in. We had
24 an agreement.

25 THE COURT: But I'm still concerned about the

1 relevance. This is all fine and dandy except that I don't know
2 the relevance. As I understand the TDP, to the extent that
3 there is a progression case, the claimant who has earlier
4 satisfied a non-malignant disease at a lower category, who now
5 -- who later has a progressive disease will be able to apply to
6 the trust under the new category with a new criteria being
7 satisfied. So I don't understand what the difference makes
8 with respect to the progression.

9 MR. BERNICK: That is right on. And then with
10 respect to how the TDP applies. Let's assume he goes through
11 all 18 and says ten of them don't work and here's why, the only
12 possible relevance -- it's a discrimination issue. We know
13 that they're not all going to be picked up. It's not designed
14 to pick everybody up. So the only issue for discrimination
15 purposes is the fact that they're not picked up -- out of these
16 18 people, whatever number is not picked up, does that go to
17 establish the proposition of different treatment? And he can't
18 testify to that because: (a) he can't say that these are
19 representative; (b) he has no comparator. There's no analysis
20 that takes place outside of Libby.

21 There's not one expert on their side who will say
22 Libby doesn't do as well under the TDP by reason of process
23 than people outside of Libby. There's no comparison to be
24 found. Our expert is the only one who has even gone through
25 and systematically applied the TDP and we haven't even called

1 him. So this is why --

2 MR. HEBERLING: Your Honor, may we be heard on some
3 of these issues? We're collecting quite a few issues here and
4 we would like to respond.

5 MR. BERNICK: Well, I'll shut up, but the problem
6 here is that we're now learning, you know, it's 6:20 on the
7 night before, what this guy is actually going to do and what he
8 is actually going to do -- his opinion has changed 19 times.
9 He's done all kinds of work. This is brand new.

10 THE COURT: Then, Mr. Bernick, then you'll point it
11 out on cross examination if that's the case. If his opinion
12 has changed 19 times and it changes the 20th time on the
13 examination, and I'm not making findings -- I'm using Mr.
14 Bernick's analogy -- then in all probability it's not going to
15 be a very credible opinion. So you'll bring that out on cross
16 examination if, in fact, your view of the world is correct.
17 Mr. Lewis?

18 MR. FINCH: Your Honor, just let the record reflect
19 that the ACC would have a foundational objection to Dr.
20 Whitehouse offering any testimony about what people will or
21 won't get under the TDP. He doesn't have the expertise to do
22 that.

23 THE COURT: Well, that is a problem -- that's the
24 problem. And that's --

25 MR. LOCKWOOD: And more importantly, to follow up on

1 that, what Mr. Bernick omitted was that at best what he could
2 testify about is that they didn't meet expedited review
3 criteria. He can't possibly testify whether they meet -- what
4 their treatment under individual review will be. And so I'm at
5 a loss to know --

6 THE COURT: Mr. Lockwood, I don't even know --

7 MR. LOCKWOOD: This is the question you were raising,
8 Your Honor.

9 THE COURT: Mr. Lockwood, I don't even know how he
10 can say that they won't qualify for expedited review treatment.
11 They haven't submitted claims yet and --

12 MR. LOCKWOOD: Well, I agree with that.

13 THE COURT: -- it's quite possible by the time the
14 trust is set up and they have to submit documentations that
15 they will qualify for expedited review treatment and there just
16 simply isn't a way at this point to know. Mr. Lewis?

17 MR. LEWIS: Your Honor, there's a couple of things
18 that were said here that I find a little bit disturbing.
19 Number one, the Court ordered us to give more documentation,
20 more medical records, extensive background on any settled
21 person that we might talk about in this case. We did that.
22 When Mr. Bernick says he doesn't have the data on these people
23 in our list that we've provided him --

24 THE COURT: No, I don't think that's what he said.

25 MR. LEWIS: That's what he said.

1 THE COURT: I think he said that he can't cull
2 through 1,800 patients to pick out the 18 or however many Dr.
3 Whitehouse will testify about because you haven't identified
4 for him who those will be.

5 MR. LEWIS: We have identified them.

6 MR. BERNICK: Now you're saying that this is what
7 he's going to do. This is the first notice we've had that he's
8 going to do this when he testifies.

9 THE COURT: And that's the problem.

10 MR. LEWIS: Your Honor, we're just doing what the
11 Court told us to do.

12 THE COURT: No, no, Mr. Lewis.

13 MR. LEWIS: Yes, you -- I can --

14 THE COURT: I opened discovery and I required that
15 discovery documents be provided. I don't have anything and I
16 haven't given an opinion and I haven't made any order that says
17 that when you're going to call a witness, how you have to make
18 the particular discovery about what that witness's substance --
19 substance of that witness's testimony will be. If Dr.
20 Whitehouse is permitted to testify, then you will have to have
21 copies of the records here that he relies on and I will defer
22 cross examination for an appropriate time to permit the plan
23 proponents to be able to look at those documents and prepare
24 for cross examination.

25 They can't possibly prepare for cross examination,

1 for example, for Dr. Whitehouse saying that person A has
2 disease B and qualifies on level 4B because they haven't been
3 able to see the documents that would back it up and to cross
4 examine Dr. Whitehouse on his opinion as to why all of those
5 facts are there. They need the medical records.

6 MR. LEWIS: They have the medical records.

7 THE COURT: Then you'll have to point them out, bring
8 copies and I'll give them an opportunity if need be to look at
9 them so that they can prepare an appropriate cross examination.

10 MR. HEBERLING: Your Honor, we delivered those
11 records in March.

12 MR. BERNICK: Yeah, all 950.

13 MR. LEWIS: And we also delivered them again in
14 response to the judge's order for these specific claims.

15 THE COURT: Okay well, if they've been delivered for
16 the specific claims --

17 MR. LEWIS: Pursuant to your order.

18 THE COURT: Okay, when was that, Mr. Lewis?

19 MR. LEWIS: Immediately after you ordered them.

20 THE COURT: Okay, so --

21 MR. LEWIS: That would have been a couple, three
22 weeks ago.

23 THE COURT: So these are non-settled malignant claim.

24 MR. LEWIS: Some of them are settled non-malignant.

25 THE COURT: I'm sorry, non -- yes, non-settled,

1 non-malignant.

2 MR. LEWIS: They're non-settled, non-malignant claims
3 and settled non-malignant claims, I'm sorry, in which we were
4 required to go back and give him all kinds of documents
5 relating to how we arrived at the settlement, correspondence
6 between -- we did that, all right.

7 MR. BERNICK: Again, the problem is, Your Honor, that
8 we had a very specific arrangement -- very specific -- about
9 the number of people that they'd be able to get into is four or
10 five. They then indicated through Dr. -- that Dr. Whitehouse
11 was going to cover more. Actually, it wasn't even that. They
12 were going to -- all kinds of designations and I raised the
13 issue saying I don't even know that we got all the information.
14 Your Honor said give him the information and then they made the
15 same argument after that that they're making today that now
16 that they've given us the information, that that somehow
17 relieves them of the limitation that Your Honor imposed which
18 was only four or five.

19 And you said specifically what you reiterated today
20 which is that you weren't ruling on that, that all you had done
21 is to say produce the information, that you were going to
22 decide in the context of this trial how much testimony
23 regarding individuals we are going to have. That's where we
24 were. And we didn't know that Dr. Whitehouse was going to come
25 in as a "treating physician" and actually opine as to how the

1 TDP works which he: a) isn't --

2 MR. LEWIS: Your Honor --

3 MR. BERNICK: -- necessarily qualified to do; but, b)
4 how does it relate to discrimination?

5 THE COURT: Okay, Mr. Bernick, you've had your say.
6 Let me hear from Mr. Lewis.

7 MR. LEWIS: Your Honor, I challenge the record on
8 that. I've got the record of what you said from the bench,
9 okay? First of all, you said from the bench, "I mean as a
10 treating physician, fine. To the extent that's relevant and
11 I'm not ruling on relevance, I think Dr. Whitehouse can testify
12 as a treating physician. But that doesn't permit him to get
13 into epidemiological issues and that's the problem. And all I
14 thought I was addressing in the prior order was his ability to
15 testify from what documents as an expert --

16 THE COURT: Right.

17 MR. LEWIS: -- in epidemiology area and not in the
18 treating physician area. And no one had ever -- had even
19 raised that issue with me."

20 THE COURT: Yes.

21 MR. LEWIS: And then subsequently the Court ruled.
22 Well, the clarification that you may need is that I wasn't
23 asked to address, wasn't addressing any testimony that Dr.
24 Whitehouse may be offering as a fact witness, as a treating
25 physician. That wasn't the intent of the order. The objection

1 I had was to strike his expert reports based on the -- and not
2 permit any testimony based on them because he hadn't produced
3 all the underlying documentation.

4 So if you need clarification on that score, I'm happy
5 to provide it. And then we have the order of the Court which
6 required us to give him this extra information and we complied.
7 And you made your motion and the Court denied your motion.

8 MR. BERNICK: Your Honor, that's a totally separate
9 issue.

10 MR. LEWIS: It's not a separate issue.

11 THE COURT: It is a separate issue.

12 MR. BERNICK: That was the issue -- that's why we
13 supplied the chart and I respect Mr. Lewis tremendously and I
14 know he is earnest in trying to muster the record but I think
15 that that is -- there are a couple of issues: 1) --

16 THE COURT: All right, I'm not addressing them today.
17 I will take a look at these documents. Where are the responses
18 to these documents in the docket? This tells me where the main
19 docket number is. I want to know what responses have been
20 filed so that I can review them. And we'll get to as many of
21 them as I can address tomorrow. If I can't read them all
22 because you folks are inundating me with paper, then I won't
23 address them all tomorrow. I'll do what I can.

24 MR. BERNICK: Can I ask Mr. Lewis whether in
25 connection with Dr. Whitehouse he intends or Mr. Heberling,

1 whether Mr. Heberling intends to elicit opinions from Dr.
2 Whitehouse regarding what we've called the epidemiological
3 issues, that is, the nature of disease at Libby, the mortality
4 study or is he only going to do what you've now described which
5 is to go through these 18 or 19 cases and talk about the TDP?

6 MR. HEBERLING: Okay, so first I'll respond and I'll
7 stay seated because that's where the microphone is. I'm sorry,
8 Your Honor.

9 THE COURT: That's fine.

10 MR. HEBERLING: As to the 18 or 19 cases, what Dr.
11 Whitehouse is going to do is testify to the last pulmonary
12 function test numbers mechanically and how those go through the
13 TDP. All we really have to do is supply the numbers and
14 anybody could decide how this TDP applies. Okay, so that's
15 very mechanical. It's not going to be opinion testimony. It
16 doesn't go into each patient's history.

17 And then with regard to the CARD Mortality Study, we
18 are intending to go through that with Dr. Frank because he was
19 a co-author of it. Now, there may be some opinions that Dr.
20 Whitehouse offers which they will be objecting to. You can
21 almost guarantee it. So we'll have to encounter those and
22 address those at the time.

23 THE COURT: Okay, as to epidemiological issues, I
24 think my ruling was that to the extent that Dr. Whitehouse was
25 opining in the reports, that he was basing his studies on 1,800

1 people, but that those records were not produced, that he could
2 not opine about the epidemiological issues with respect to
3 those 1,800 people because he can't possibly be cross examined
4 when he can't produce the information. So I don't see how he's
5 going to offer an epidemiological opinion.

6 As to fact witness -- I'll call it fact witness. I
7 understand he's a physician. As a treating physician, if there
8 is something relevant, he is permitted to testify. Whether
9 there will be something relevant, I don't know until I hear the
10 testimony. I can't possibly make a relevance ruling in
11 advance. I don't think Dr. Whitehouse can testify as to how
12 the TDP will apply to any specific person, because that does
13 require, I think, some either level of expert analysis or it at
14 least requires the TDP to be up and functioning and some
15 process in place to see that.

16 He can say that his tests have revealed that, you
17 know, the most recent PFT shows x,y,z or whatever. He's the
18 treating physician. I don't even know if you need him for that
19 purpose if you have that information in chart form and it's
20 backed up by the documents that you've submitted. I think you
21 could probably get a stipulation to that effect. I don't know
22 the relevance. But if it's relevant, then he could testify to
23 it.

24 MR. BERNICK: What might be worthwhile, if I can try
25 to make a suggestion in order to keep this process rolling

1 because I think today an awful lot got done, I think people
2 tried very hard and we appreciate Your Honor's patience and
3 allotting so much time, maybe if we started out with Mr. Hughes
4 who's next, and then went to Dr. Molgaard?

5 MR. HEBERLING: Yes.

6 MR. BERNICK: Okay, and then --

7 MR. HEBERLING: That's what we intend.

8 MR. BERNICK: And then -- I'm sorry?

9 MR. HEBERLING: That's what we intend, yes.

10 MR. BERNICK: Okay, and then -- and so we don't do
11 the claimants first and then you'll let us know if you could by
12 email tonight if you're really going to call these claimants or
13 the two people.

14 MR. LEWIS: The Court has sort of advised us I think
15 today again that --

16 MR. BERNICK: I understand that. I don't know what
17 --

18 THE COURT: Until they're called and you tell me for
19 what purpose, I'm not willing to say they can't testify. I
20 haven't heard anything yet that tells me what their testimony
21 -- what relevance their own testimony has. Dr. Whitehouse, I
22 understand. I don't see how the particular person can
23 necessarily advance the ball. If you want photographs of the
24 facility at Libby, from my point of view, I don't care whether
25 there are photographs of Libby. But it's not going to be

1 relevant to the determination of how the TDP works because I
2 won't have a comparison of the photographs of Libby and it
3 doesn't matter because the Libby folks, as long as they have
4 lived in Libby for six months, qualify under the other reviews
5 anyway. They don't have to have worked in the facility and I
6 understand they've had serious exposure issues. No one's even
7 contesting that they haven't had serious exposure to Grace
8 asbestos.

9 MR. LEWIS: In fact, I think we probably will call
10 those witnesses but we'll advise the Court first thing in the
11 morning.

12 MR. BERNICK: Well, if you could advise us tonight so
13 that we don't spend time, you know, going --

14 MR. LEWIS: We'll caucus and we'll call you.

15 MR. BERNICK: Okay, and then with respect to Dr.
16 Whitehouse, if you can tell us tonight what your intent is just
17 regarding the scope of his testimony in light of what the Court
18 has said, that'll certainly make it easier for us to determine
19 what we have to do.

20 MR. LEWIS: Well, we want Dr. Whitehouse here. In
21 lieu of the 100 witnesses that --

22 THE COURT: Yes.

23 MR. LEWIS: -- she suggested to us, Dr. Whitehouse
24 can do exactly what we're trying to do here.

25 THE COURT: I think Dr. Whitehouse can testify to

1 those facts to the extent that they're relevant. I don't see
2 why he can't. He's the treating physician. If he's diagnosed
3 it or seen the records. He's clearly competent to testify
4 about the medical condition and the PFT scores. So if that's
5 relevant, I'm just not sure that you need him for that purpose
6 because the stipulation may do it. If you want him on the
7 stand for credibility purposes, that's fine.

8 MR. BERNICK: Yeah. I'm more focused really on the
9 CARD Mortality Study and the other things where I think the
10 Court has given us an indication of what's going to happen.

11 MR. HEBERLING: Perhaps I should --

12 MR. LEWIS: We're not going to violate an order of
13 the Court. The Court says we can't use him for epidemiological
14 purposes, you know. Good point.

15 MR. HEBERLING: Perhaps we -- we may try to clarify
16 that in the CARD Mortality Study there's 76 people,
17 non-malignant deaths and we delivered all the medical records
18 long ago on those people and we believe that's a freestanding
19 study. It doesn't relate to the 950 or the 1,800. But if the
20 Court is of the opinion that he is prevented from testifying on
21 epidemiology matters because of the failure to deliver all
22 1,800 sets of records, we understand that.

23 THE COURT: I have ruled on the 1,800. I don't even
24 think I've had an issue with respect to a separate 76 study.

25 MR. BERNICK: No, the 76 are part of the 1,800 and

1 they're the core of the CARD Mortality Study.

2 THE COURT: That's an issue that you folks are going
3 to have to either let me read if you've briefed because I
4 haven't seen it or you're going to have to describe to me in
5 more detail. They're telling me it's a separate study. You're
6 telling me it isn't. I don't have a clue.

7 MR. BERNICK: That's fine, and this is not a question
8 that I think we need to negotiate before the Court but I --
9 right now, it's not just our inconvenience in preparing to
10 cross examine Dr. Whitehouse on the 76 which is the core of the
11 CARD Mortality Study. That's why everything is being done on
12 CARD is the 76 people. It's not separate. It's the core of
13 the thing and I don't think that Mr. Lewis or Mr. Heberling are
14 going to say that somehow it's now a different study.

15 So I would urge counsel to reach out to us and talk
16 through what's going to happen tomorrow. We'll see if we can
17 resolve this among ourselves. But this is not just a question
18 of convenience to us. This is a question of how tomorrow is
19 going to be taken, because we're now going to lose a very
20 significant period of time, dead time in court --

21 THE COURT: Mr. Bernick --

22 MR. BERNICK: -- because Dr. Frank isn't going to be
23 here until Thursday.

24 THE COURT: Well, then if that's the case, I don't
25 know if you have any other witnesses that can be called in this

1 respect.

2 MR. BERNICK: That is exactly the problem now is that
3 we really wanted to be sure that we would have -- we'll caucus
4 and see if there's somebody we can call now. But this is the
5 whole reason, and this could have been avoided, by simply
6 letting us -- having the discussion that we're having now like
7 three days ago so we could fill the schedule or having Dr.
8 Frank here.

9 THE COURT: Okay, there's nothing I can do to fix
10 that problem now.

11 MR. BERNICK: There's nothing you can do.

12 THE COURT: So we are going to recess until nine
13 o'clock tomorrow. Mr. Demmy --

14 MR. DEMMY: Your Honor, one more item. I'm sorry.
15 This will take 30 seconds of your time and I appreciate the
16 Court letting me speak. John Demmy for Fireman's Fund. You
17 mentioned earlier this morning, maybe one of the first things
18 you did mention was a Fireman's Fund motion that you had not
19 seen. My understanding is that we have -- my office has
20 communicated with chambers and that you have that motion. You
21 probably haven't seen it.

22 THE COURT: I have seen it. I read it at lunchtime.
23 I scheduled it for the September 29th conference with a
24 response date of September the 16th at five o'clock.

25 MR. DEMMY: Thank you, Your Honor.

1 THE COURT: It's not on the docket yet but that's
2 what I did.

3 MR. DEMMY: Thank you, Your Honor.

4 MR. LEWIS: Are we in recess, Your Honor?

5 THE COURT: Ms. Baer?

6 MS. BAER: Your Honor, I just wanted to point out
7 that if you were going to look at the Libby motions, they have
8 corresponding agenda items where the responses are. The very
9 first one on that chart is agenda item Number 6. The very
10 second one is agenda item Number 8. The third one is agenda
11 item Number 7. And then, Your Honor, the next three are
12 related to prior orders but they are a motion that was just
13 filed yesterday but they relate to prior orders.

14 MR. LACY: Does this reference the motion?

15 MS. BAER: No, this has nothing to do with the
16 reliance materials. On the reliance materials and the issue of
17 confidentiality, we worked that out with the Libby folks. We
18 have draft language on an order that we will submit to the
19 Court in the morning, Your Honor.

20 MR. LACY: I'm referring to a different -- there was
21 a separate motion in limine filed. It raised reliance
22 materials that reference Dr. Frank, Dr. Molgaard and Dr.
23 Whitehouse.

24 THE COURT: I have no clue. When was this filed?

25 MR. LACY: Yeah, and that's why I'm asking if it was

1 on this -- I don't have the docket number.

2 THE COURT: Why am I getting everything the day
3 before trial starts? You know, it's not as though this has --
4 this case hasn't been pending long enough. Ms. Baer, I haven't
5 seen the motion I don't think that you're referring to with
6 respect to these last three. The one that I saw that was filed
7 yesterday related to the confidentiality issue. I haven't seen
8 another one.

9 MS. BAER: It was filed late yesterday, Your Honor.
10 There were two motions filed. One was early and that's the one
11 you're talking about. There was one filed late and that's the
12 docket number that's on --

13 THE COURT: So I don't have responses in from anybody
14 about these things yet?

15 MS. BAER: No, Your Honor.

16 THE COURT: Well, then how am I going to hear about
17 them?

18 MS. BAER: Your Honor --

19 MR. BERNICK: Objections re individual evidence, no
20 lead to current or future claims. Yet it is only the last one
21 that was filed yesterday. There was a deadline for motions in
22 limine, right? But there's a deadline for Daubert. All of
23 these things ended up getting pushed back though because of the
24 continued discovery relating to experts who are going to be
25 addressing Libby. That's what the source of the problem was.

1 So some of these things relate to -- are old issues. Preclude
2 expert testimony regarding 1,800, that is an old issue. All
3 we've done is file the motion that essentially seeks
4 enforcement of your prior determination on that.

5 THE COURT: I'm concerned about the 23184 which
6 apparently --

7 MR. BERNICK: 23184 --

8 THE COURT: -- was filed last night and as to which I
9 haven't seen it. I don't know if anybody's seen it yet.

10 MR. BERNICK: The 23184 is the one that is triggered
11 by -- it is new and it's the one that is triggered by all of
12 these individual -- the indication that all these individual
13 cases are going to come up. And that one we did file. We've
14 argued this before but we did file that just now and the
15 principal reason that we're flagging it is that the agreed
16 order regarding experts not only specifies the number of
17 individuals who can be at issue but also says, and this is why
18 it's germane to Whitehouse, you can't -- there's no additional
19 reliance materials that the experts can use beyond those that
20 were already identified as of July.

21 THE COURT: -- July, yes.

22 MR. BERNICK: And to the extent that all these
23 additional things have now come in as being -- new individuals
24 whose cases are going to be presented and Dr. Whitehouse is
25 going to talk about them, then they would be -- run afoul of

1 that order and that's why we filed this.

2 Now, if I can reach agreement with Mr. Heberling and
3 Mr. Lewis about who it is that they're actually going to have
4 Dr. Whitehouse talk about as now essentially a fact witness and
5 it's a limited number, we've gone back and it turns out that
6 they didn't give us all those files, they gave us some, not
7 all, I can have a conversation with him and we can get down to
8 a small number of people, we don't care. We can have Mr.
9 Whitehouse -- Dr. Whitehouse testify and get this thing done.

10 THE COURT: Okay, folks, we really do have to leave.

11 MR. BERNICK: Yes.

12 THE COURT: I promised staff we'd be out of here by
13 6:30. We're going to miss buses and that's a problem. So I'm
14 not doing this any longer. If you've got these issues, you
15 bring them up at lunchtime and those of you who care enough,
16 will not eat lunch and we'll deal with these at lunch from here
17 on in.

18 Okay, with respect to 23184, I haven't seen it.
19 Gentlemen, be prepared to argue it tomorrow morning because
20 that's what we're going to do.

21 MR. LOCKWOOD: Your Honor, I have a copy of it.

22 THE COURT: I'll take it.

23 MR. LOCKWOOD: It doesn't have the docket number on
24 it.

25 THE COURT: That's fine.

1 MR. LEWIS: Is that the one served on us at nine
2 o'clock last night?

3 THE COURT: Thank you.

4 MR. LOCKWOOD: Yes.

5 MR. LEWIS: Okay.

6 THE COURT: Okay, we'll address this tomorrow
7 morning. Okay, these issues, the Daubert motion, the motion
8 preclude the expert testimony concerning the 1,800 although
9 unless there's something different about the 76, I think I've
10 already ruled on the 1,800, the individual testimony I think
11 I've addressed and counsel is apparently prepared to do this
12 through Dr. Whitehouse if I understand it as opposed to the
13 individuals. So I don't think there's too much with respect to
14 what are currently agenda numbers 7 and 8. But I'll take a
15 look at them again. Be prepared to address them tomorrow and
16 this new 23184.

17 MR. BERNICK: Thank you very much.

18 THE COURT: All right, we're adjourned to nine
19 o'clock.

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C E R T I F I C A T I O N

We, RITA BERGEN, KELLI PHILBURN, KIMBERLY UPSHUR, KATHLEEN BETZ, TAMMY DeRISI, ELAINE HOWELL and MARY POLITO, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above entitled matter, and to the best of our ability.

/s/ Rita Bergen

RITA BERGEN

/s/ Kelli R. Philburn

KELLI PHILBURN

/s/ Kimberly Upshur

KIMBERLY UPSHUR

/s/ Kathleen Betz

KATHLEEN BETZ

/s/ Tammy DeRisi

TAMMY DeRISI

/s/ Elaine Howell

ELAINE HOWELL

/s/ Mary Polito

MARY POLITO

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DATE: September 10, 2009

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